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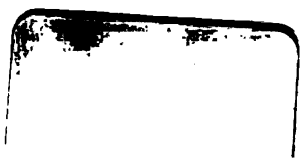
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CONSTITUTION OF CANADA.

H. 0826

THE BRITISH NORTH AMERICA ACT, 1867;

ITS INTERPRETATION,

GATHERED FROM THE

DECISIONS OF COURTS, THE DICTA OF JUDGES, AND
THE OPINIONS OF STATESMEN AND OTHERS;

TO WHICH IS ADDED

THE QUEBEC RESOLUTIONS
OF 1864,

AND THE

CONSTITUTION OF THE UNITED STATES.

BY
JOSEPH DOUTRE, Q.C.,
OF THE MONTREAL BAR.

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Entered according to Act of Parliament, in the year one thousand eight hundred and eighty, by JOSEPH DOUTRE, Q. C., in the office of the Minister of Agriculture and Statistics of the Dominion of Canada.

TO
THE RIGHT HONOURABLE
HENRY HOWARD MOLYNEUX HERBERT,
Earl of Carnarvon,

THIS WORK
IS, WITH HIS KIND PERMISSION,

Dedicated,

IN ADMIRATION OF THE SUPERIOR ABILITIES AND THE SOUND SENSE UNIFORMLY
DISPLAYED BY HIS LORDSHIP AT THE HEAD OF THE COLONIAL OFFICE.

CONSTITUTION OF CANADA.

P R E F A C E .

THE design of this work is not to be a commentary upon the text of the Federal compact, but, to bring together, by the side of the text, the decisions of the Courts, with the dicta of judges and statesmen; and to discover the principles which will aid those engaged in framing Federal or Provincial laws, and the legal profession generally in the interpretation of the Constitution of the Country.

Previous to "The British North America Act, 1867," the Provincial Courts did not consider they possessed the power of enquiring and deciding whether the laws of their respective Legislatures were constitutional or not. Occasional attempts were made to test the validity of statutes, but they were ineffectual in their results. It has been and is quite different under the Federal Act. The Supreme Court of Canada and the Privy Council in England, have both concurred in recognizing the right, assumed by the Provincial Courts of original and appellate jurisdiction, to pass upon the constitutionality of the laws enacted by the Provincial Legislatures and the Parliament of Canada. This was anticipated by the framers of the Act, as appears by the Debates in the House of Commons.

On the 4th of March, 1867, when the Bill was under discussion, in the Imperial Parliament, Mr. Cardwell said: "As matters now stand, if the Legislatures of Canada acted *ultra vires*, the question would first be raised in the Colonial Law Courts, and would ultimately be settled by the Privy Council at home."

Important decisions of the Privy Council, of the Supreme Court of Canada, and of the various Provincial Courts, have been already re-

ported, pronouncing upon the validity of the Dominion and Provincial Statute Laws, and, on many points settling the principles that should be applied in the construction of the Confederation Act, and defining the limit and scope of Federal and Provincial Legislation.

It may be thought by some, inadvisable, to have noted so many decisions of the Federal Court of the United States, but it will be remarked, how frequently our Judges have been compelled, in the absence of other precedents, to look to the decisions of the highest Court of that Confederacy ; for, that Republic also consists of a Federal Union of separate Sovereign States with a written constitution prescribing the sphere of action of the Central Government and of the Local Governments ; and this necessarily required continual appeals to the Judiciary to define, determine, and settle, the line of demarkation between these two jurisdictions. Several cases have been reported more at length than many may, at first sight, deem expedient or desirable for a work of this kind ; but it must be borne in mind that these are recent and important cases, involving many issues of great moment, which have been discussed with great ability by the Judges of the Court of last resort in this Dominion.

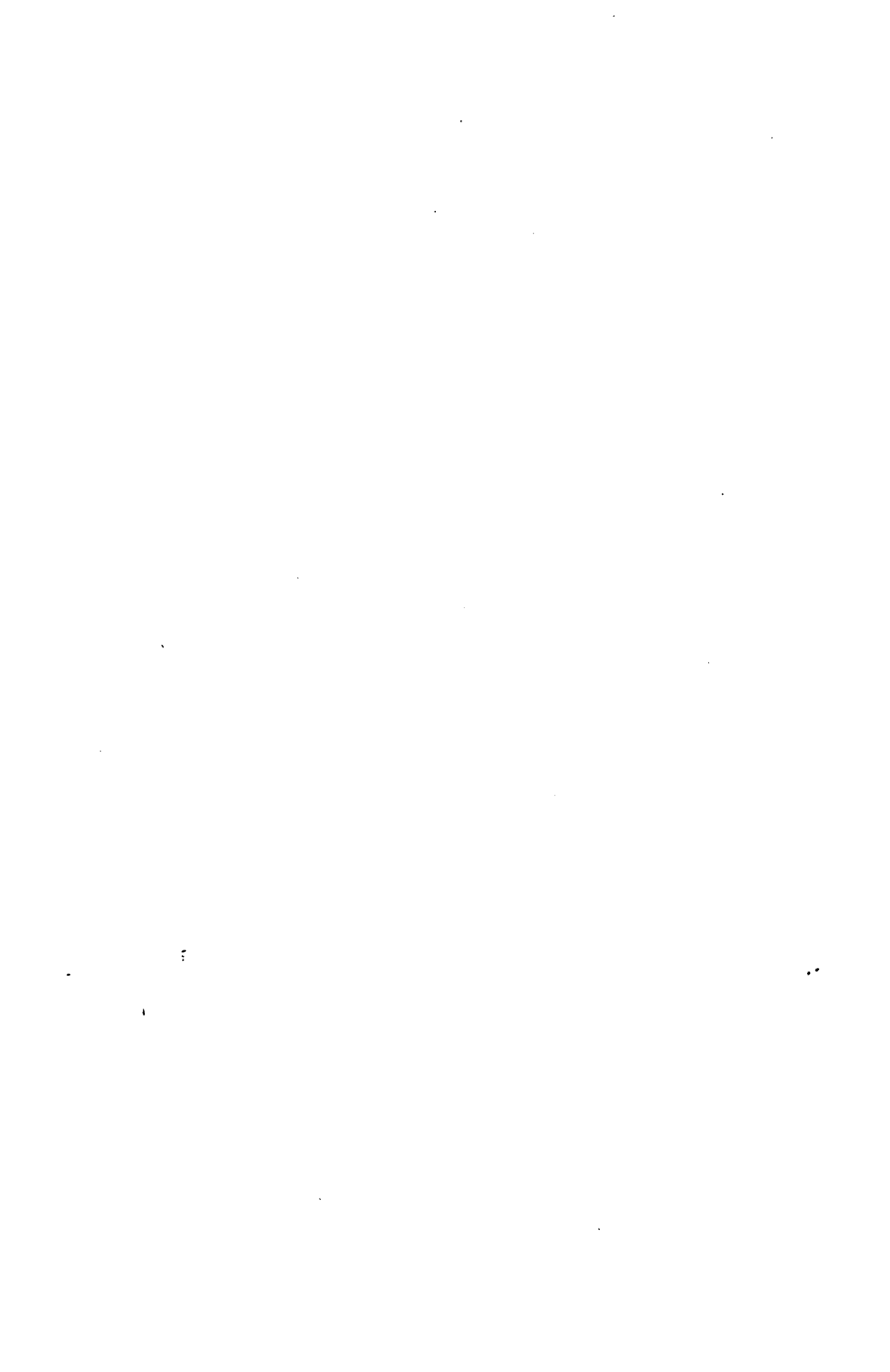
But, for those who do not lose sight of the fact that we are on the threshold of a new system of national existence, and, from want of an experience that time alone can give, are deprived of any great number of judicial decisions, no apology will be necessary.

The Quebec Resolutions of 1864, and the Constitution of the United States have been added, for the reason, that a ready reference to them is useful, if not necessary, in the study of the Constitutional Act of Canada.

It is but just to acknowledge, here, the efficient assistance afforded in our preparation of this work by L. H. Pignolet, Esq., of the Montreal Bar, and by A. A. Stockton, Esq., of the St. John, N. B., Bar, to whom the Author tenders his cordial thanks and this expression of his gratitude.

ABBREVIATIONS.

Abd.	Abridgment.	L. C. R.	Lower Canada Reports.
Ad. & El.	Adolphus & Ellis.	Leg.	Legislature.
A. & E.	Do.	Legis.	Legislative.
Alleg.	Allegiance.	Lient.-Gov.	Lieutenant Governor.
App.	Appeal.	L. J.	Law Journal.
App'd.	Appointed.	L. N.	Montreal Legal News.
Art.	Article.	L. R.	Law Reports.
B.	Baron.	L. T., N. S.	Law Times, New Series.
B. N. A.	British North America.	Mass.	Massachusetts.
B. & Ad.	Barnewall & Adolphus.	Mill, Pol. Econ.	Mill Political Economy.
B. & B.	Broderip & Bingham.	Md.	Maryland.
B. & C.	Barnewall & Cresswell.	Metc.	Metcalfe.
Barn. & Cress.	Barnewall & Cresswell.	M. & S.	Maule & Selwyn.
B. & P.	Boanquet & Fuller.	M. & W.	Meeson & Welsby.
B. & S.	Best & Smith.	N. B.	New Brunswick.
Barb.	Barbour.	N. S.	Nova Scotia.
Bing.	Bingham.	N. S.	New Series.
Bl. Com.	Blackstone's Commentaries.	Nev.	Nevada.
Brod. & Bing.	Broderip & Bingham.	O.	Ontario.
Burr.	Burrow.	Ont.	Ontario.
C.	Chapter.	Ont. App.	Ontario Appeals.
Ch.	Do.	P.	Page.
Ch.	Chancery.	Parl.	Parliament.
Chanc.	Do.	P. E. I.	Prince Edward Island.
Can.	Canada.	P. C.	Privy Council.
Can. S. C.	Canada Supreme Court.	P. C., N. S.	Privy Council, New Series.
C. B.	Common Bench.	Pet.	Peter's.
C. J.	Chief Justice.	Prov.	Provincial.
C. L. J.	Canada Law Journal.	Pugs.	Pugsley.
Com.	Commentaries.	Pugs. & Burb.	Pugsley & Burbridge.
Comm.	Commerces.	Q.	Quebec.
Cons.	Constitution.	Que.	Quebec.
Cool. Cons. Lim.	Cooley's Constitutional Limitations.	Qual.	Qualification.
Cowp.	Cowper.	Q. B.	Queen's Bench.
C. P.	Common Pleas.	Q. L. B.	Quebec Law Reports.
C. S. L. C.	Consolidated Statutes Lower Canada.	R. C.	Revue Critique.
C. S.	Cour Supérieure.	R.	Reports.
Depart.	Department.	Rep.	Do.
Dom.	Dominion.	Rev. de Lég.	Revue de Législation.
Dom. Sess. P. ...	Dominion Sessional Papers.	R. L.	Revue Légale.
Durn. & East.	Durnford & East.	S. O.	Superior Court.
E. & B.	Ellis & Blackburn.	S. O.	Supreme Court.
Elect.	Electoral.	Sect.	Section.
Eng.	England.	SS.	Sub-Section.
Eq.	Equity.	S. T.	State Trials.
Exch.	Exchequer.	S. C. of N. B.	Supreme Court of New Brunswick.
Exec.	Executive.	Tann.	Taunton.
Geo.	George.	T. B.	Term Reports.
Gov.	Governor.	U. C.	Upper Canada.
Gov't.	Government.	U. S.	United States.
Gr. Ch.	Grant's Chancery.	U. S. S. C.	United States Supreme Court.
Hist.	History.	V. C.	Vice Chancellor.
H. of C.	House of Commons.	Vict.	Victoria.
H. of Com.	House of Commons.	V. R.	Victoria Regina.
H. L.	House of Lords.	W.	William.
How.	Howell.	Wall.	Wallace.
Imp.	Imperial.	W. Bl.	William Blackstone.
J.	Jurist.	Wend.	Wendell.
K. B.	King's Bench.	Wheat.	Wheaton.
L. C.	Lower Canada.	W. R.	Weekly Reporter.
L. C. J.	Lower Canada Jurist.		



INTRODUCTION.

A SHORT history of the events which preceded and prepared the way for the Confederation of the North American British Provinces may be useful in leading the mind away from unprofitable researches, and bringing prominently to view the steps that have marked the growth of a policy, which has raised the Colonial possessions of England to a condition of almost complete independence of the parent state.

"Until the commencement of the difficulties with America," says Thomas Erskine May, in commenting on the Colonial Administration of the Mother Country, "there had not even been a separate department for the government of the Colonies; but the Board of Trade exercised a supervision little more than nominal over colonial affairs. In 1768, however, a third Secretary of State was appointed, to whose care the Colonies were entrusted.

"In 1782, after the loss of the American Provinces, the office was discontinued by Lord Rockingham, but was revived in 1794, and became an active and important department of State. Its influence was felt throughout the British Colonies. However popular the form of their institutions, they were steadily governed by British Ministers in Downing Street.

"In Crown Colonies—acquired by conquest or cession—the dominion of the Crown was absolute, and the authority of the Colonial Office was exercised directly by instructions to the Governors. Some of them, however, like Jamaica and Nova Scotia, had received the free institutions of England, and were practically self-governed. In 1785 representative institutions were given to New Brunswick, and so late as 1832 to Newfoundland. But the Mother Country, in granting these constitutions, exercised, in a marked form, the powers of a dominant state.

"Canada, the most important of this class, was conquered from the French, in 1759, by General Wolfe, and ceded to England, by the Treaty of Paris (10th February, 1763). (1) In 1774 (14 Geo. III, c. 83) the administration of its affairs was entrusted to a council appointed by the Crown; but in 1791 (31 Geo. III, c. 31) it was divided into two provinces, to each of which representative institutions were granted. It was no easy problem to provide for the government of such a colony." (2).

Mr. Justin McCarthy, in chap. 3 of his recent and interesting "HISTORY OF OUR OWN TIMES," describes, as follows, the condition of the country at that time.

"The condition of Canada was very peculiar. Lower Canada was inhabited for the most part by men of French descent, who still kept up in the midst of an active and moving civilization most of the principles and usages which belonged to France before the Revolution of 1789. Since the cession the growth of the population of the other province had been surprisingly rapid, and had been almost exclusively the growth of immigration from Great Britain, and one or two of the colonizing states of the European continent, and from the American Republic itself.

"It would have been difficult, therefore, for the Home Government, however wise and far-seeing their policy, to make the wheels of any system run smoothly at once, in such a colony as Canada. But their policy certainly does not seem to have been either wise or far-seeing. The plan of government adopted looks as if it were especially devised to bring out into sharp relief, all the antagonisms that were natural to the existing state of things. By an Act, called the Constitution of 1791, Canada was divided into two provinces, the Upper and the Lower. Each province had a separate system of government, consisting of a Governor; an Executive Council appointed by the Crown, supposed in some way to resemble the Privy Council of this country; a Legislative Council, the members of which were appointed by the Crown for life; and a Representative Assembly, the members of which were elected for four years.

"When the two provinces were divided in 1791, the intention was, that they should remain distinct in fact as well as in name. It was hoped that Lower Canada would remain altogether French, and that Upper Canada would be exclusively English. Then it was thought that they might be governed on their separate systems as securely and with as little trouble as we now govern the Mauritius on one system and Malta on another.

"Those who formed such an idea do not seem to have taken any counsel with geography. The one fact, that Upper Canada can hardly be said to have any means of communication with Europe and the whole Eastern world, except through Lower Canada, or else through the United States, ought to have settled the question at once.

"It was in Lower Canada that the greatest difficulties arose. A constant antagonism grew up between the majority of the Legislative Council, who were nominees of the Crown, and the majority of the Representative Assembly, who were elected by the population of the province. The Home Government encouraged and indeed kept up that most odious and dangerous of all instruments for the supposed management of

(1) 1 Chalmer's Treaties 467.

(2) 2 May's Cons. Hist. of Eng. 525-527.

a colony—a “British party” devoted to the so-called interests of the Mother Country, and obedient to the word of command from their masters and patrons at home. The majority in the Legislative Council constantly thwarted the resolutions of the vast majority of the popular Assembly. Disputes arose as to the voting of supplies. The Government retained in their service officials whom the Representative Assembly had condemned, and insisted on the right to pay them their salaries out of certain funds of the colony. The Representative Assembly took to stopping the supplies, and the Government claimed the right to counteract this measure by appropriating to the purpose such public moneys as happened to be within their reach at the time.

“At last the Representative Assembly refused to vote any further supplies or to carry on any further business. They formulated their grievances against the Home Government. Their complaints were of arbitrary conduct on the part of the Governors; intolerable composition of the Legislative Council, which they insisted ought to be elective; illegal appropriation of the public money; and violent pro rogation of the Provincial Parliament.

“The Governor issued warrants for the apprehension of many members of the popular Assembly on the charge of high treason. Some of these at once left the country; others against whom warrants were issued were arrested, and a sudden resistance was made by their friends and supporters. Then, in the manner familiar to all who have read anything of the history of revolutionary movements, the resistance to a capture of prisoners, suddenly transformed itself into open rebellion.”

“When the discontents of Lower Canada, says May, exploded in insurrection, the constitution of that Province was immediately suspended by the British Parliament, and a provisional government established with large legislative and executive powers (1 and 2 Vict. c. 9, and 2 and 3 Vict. c. 53). This necessary act of authority was followed, in 1840, by the re-union of the Provinces of Upper and Lower Canada into a single colony under a Governor General (3 and 4 Vict. c. 35).

“The constitution, granted on this re-union of the two Provinces, was popular, but not democratic. It was a legislative union composed of a Legislative Council nominated by the Crown and of a Representative Assembly to which freeholders or *roturiers*, to the amount of £500, were eligible as members. The franchise comprised 40s. freeholders, £5 house owners, and £10 occupiers: although afterwards placed upon a more popular basis by Provincial Acts (16 Vict. Can. c. 153, and 22 Vict. Can. c. 82). Cons. History of England, Vol. 2, pp. 531–535.”

“In discussing the policy adopted at that time by the Home Government, Mr. Fox laid down a principle, which was destined, after half a century, to become the rule of colonial administration. ‘I am convinced, said he, that the only means of retaining distant colonies with advantage, is to enable them to govern themselves.’”

Other eminent statesmen advocated the same policy.

"The doctrine (1) that the parent state has supreme power over the colonies is not only borne out by authority and by precedent, but will appear, when examined, to be in entire accordance with justice and with policy. During the feeble infancy of colonies, independence would be pernicious, or rather fatal to them. Undoubtedly, as they grow stronger and stronger, it will be wise in the Home Government to be more and more indulgent. No sensible parent deals with a son of twenty in the same way as with a son of ten. Nor will any government not infatuated treat such a province as Canada or Victoria in the way in which it might be proper to treat a little band of emigrants who have just begun to build their huts on a barbarous shore, and to whom the protection of the flag of a great nation is indispensably necessary. Nevertheless, there cannot really be more than one supreme power in a society. If, therefore, a time comes at which the Mother Country finds it expedient altogether to abdicate her paramount authority over a colony, one of two courses ought to be taken. There ought to be complete incorporation, if such incorporation be possible. If not, there ought to be a complete separation. Very few propositions in politics can be so perfectly demonstrated as this—that parliamentary government cannot be carried on by two really equal and independent Parliaments in one Empire."

"Thus, remarks May, by rapid strides have the most considerable dependencies of the British Crown advanced, through successive stages of political liberty, until an ancient Monarchy has become the parent of Democratic Republics in all parts of the globe.

"England ventured to tax her colonies, and lost them; she endeavored to rule them from Downing Street, and provoked disaffection and revolt,—at last she gave freedom, and found national sympathy and contentment." (2)

The lessons of the past have taught British statesmen that, in the government of any people, political reform and changes must follow the growth of intelligence and sound ideas of political liberty. Lord Palmerston said, at a public dinner in London, in August, 1864:

"Nations on the continent which have forgotten or overlooked the duties of improvement and reform, have encountered the evil of violent tumult and revolution. I trust that in this country, there will always be found a desire carefully to study its institutions, and a resolution to destroy abuses wherever they exist, and to reform those institutions, wherever they can be usefully reformed. I trust that the people and government will always continue that determination, with a fixed resolve to respect the great framework of our Constitution; because I am persuaded that, imperfect as all human institutions are, still, never did man frame a Constitution which more happily combined respect for religion, regard for liberty, and respect and loyalty to the throne, together with the preservation of the rights of every individual who lives under the sceptre of the throne.

(1) Macaulay, *Hist. Eng.*, chap. 23.

(2) 2 May, *Cons. His. of England*, 524-538.

"I am convinced that no people ever did combine these great and essential elements of prosperity and happiness so completely as the English people now do."

Montesquieu, in the same line of thought, says :

"Carthage périt, parceque, lorsqu'il fallut retrancher les abus, elle ne put souffrir la main de son Annibal même. Athènes tomba, parceque ses erreurs lui parurent si douces qu'elle ne voulut pas en guérir.

"Le gouvernement d'Angleterre est plus sage, parcequ'il y a un corps qui l'examine continuellement, et qui s'examine continuellement lui-même; et telles sont ses erreurs qu'elles ne sont jamais longues, et que, par l'esprit d'attention qu'elles donnent à la nation, elles sont souvent utiles.

"En un mot, un gouvernement libre, c'est-à-dire toujours agité, ne saurait se maintenir s'il n'est, par ses propres lois, capable de correction." (1)

The example of the prosperous union of the American States could not but suggest to the minds of the colonists of these Provinces, the feasibility of a Confederation of quite a similar pattern for Provinces divided from each other by a mere geographical line. About the year 1800 (2) the Hon. R. J. Uniacke, of Nova Scotia, recommended a colonial union to the Imperial authorities, and, in 1814, Chief Justice Sewell, of Quebec, addressed to the Duke of Kent, father of Her present Majesty, a letter commending such a plan. In 1822, Sir John Beverley Robinson, at the request of the Colonial Office, submitted a scheme of the same nature. In December, 1825, Robert Gourlay, writing from London, laid down the principles upon which Confederation was effected, in 1867. The most authoritative suggestion on the subject is to be found in the report of Lord Durham, who was sent to Canada, as High Commissioner, to ascertain the causes and extent of the complaints which had resulted in open rebellion, in 1837-38.

"Lord Durham's report, says Mr. McCarthy, was acknowledged by enemies as well as by the most impartial critics to be a masterly document. As Mr. Mill has said, it laid the foundation of the political success and social prosperity, not only of Canada, but of all the other important colonies. After having explained in the most exhaustive manner the causes of discontent and backwardness in Canada, it went on to recommend that the government of the colony should be put as much as possible into the hands of the colonists themselves, that they themselves should execute, as well as make the laws; the limit of the Imperial Government's interference, being, in such matters as affect the relations of the colony with the Mother Country; such as the constitution and form of government, the regulation of foreign relations and trade, and the disposal of the public lands. Lord Durham proposed to establish a thoroughly good system of municipal institutions; to secure the independence of the judges; to make all provincial officers, except the governor and his secretary, responsible to the colonial legislature; and to repeal all former legislation with respect to the reserves of land for the clergy. Finally, he proposed that the provinces of Canada should be re-united politically and should become one legislature, containing the representatives of both races and of all districts. It is significant that the report also recommended that in any

(1) *Esprit des Lois*, p. 237.

(2) 2 Tuttle's *History of the Dominion*, p. 25.

act to be introduced for this purpose, a provision should be made by which all or any of the other North American colonies should, on the application of their legislatures, and with the consent of Canada be admitted into the Canadian Union. Thus the separation, which Fox thought unwise, was to be abolished; and the Canadas were to be fused into one system, which Lord Durham would have had, a federation. In brief, Lord Durham proposed to make the Canadas self-governing, as regards their internal affairs, and the germ of a federal union.”?

The first legislative step towards a Federal union was made by the Parliament of Nova Scotia, in 1861, by a unanimous vote of the Legislative Assembly, which was favorably received by the Secretary of State for the Colonies, in a despatch of the 6th July, 1862.

The Legislatures of Nova Scotia, New Brunswick, and Prince Edward Island appointed delegates, in the beginning of 1864, to meet at Charlottetown, P.E.I., and confer together in reference to a union of these Maritime Provinces.

About the same time, the difficulties met by the public men of Canada in carrying out their Government, induced a coalition of the leaders of the two conflicting parties to resort to a Federal system, and a government was formed of these opposite elements, with the following programme :

“ The government is prepared to pledge themselves to bring in a measure, next session, for the purpose of removing existing difficulties, by introducing the Federal principle in Canada, coupled with such provisions as will permit the Northern Provinces and the North West Territory to be incorporated with the same system of government.”

Within a month of the formation of the coalition government of Canada, the Charlottetown Convention was arranged. The delegates of the Maritime Provinces were, as already stated, appointed by their respective Legislatures, and the delegates of Ontario and Quebec by their Government. Newfoundland was not represented.

The Convention met on the 1st September, 1864, and re-assembled again on the 10th September, 1864. The meeting was confined to the delegates from the Maritime Provinces. On the 12th September, 1864, the Convention again assembled, the Canadian delegates participating in the business, and all proceedings being conducted with closed doors.

Beyond an interchange of sentiments, nothing was done at Charlottetown, except to arrange for another Convention, to be held at Quebec, at the call of the Governor General. The delegates of the Maritime Provinces were only empowered to discuss the propriety of a Legislative union among themselves, while the Canadian delegates were authorized to treat only of a Federal union. The presence of the latter could only be informal, as the possibilities of such a union were

neither foreseen nor comprehended by the resolutions of the Maritime Legislatures.

The Governor General called together the Intercolonial Convention at Quebec, for the 10th October, 1864. Canada was represented by 12 delegates, 6 for each of the Provinces of Upper Canada and Lower Canada, New Brunswick by 7, Nova Scotia by 5, Prince Edward Island by 7, and Newfoundland by 2. This Convention sat with closed doors, and nothing but the result of the deliberations was known. Seventy-two Resolutions were adopted, by one vote for each Province, after eighteen days debate, and these Resolutions were submitted to the respective Legislatures at the ensuing session. The Canadian Parliament met in January, 1865, and the following Resolution was moved in the two Houses simultaneously, viz. : "That an humble Address be presented to Her Majesty, praying that She may be graciously pleased to cause a measure to be submitted to the Imperial Parliament for the purpose of uniting the Colonies of Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, in one government, with provisions based on certain Resolutions which were adopted at a Conference of Delegates from the said Colonies, held at the city of Quebec on the 10th October, 1864." The Address was agreed to in the Legislative Council, on the 20th February, 1865, by a vote of 45 to 15, and in the Assembly, on the 10th March following, by a vote of 91 to 33.

In the Maritime Provinces, the plan adopted by the Quebec delegates was not favorably received by the people.

In New Brunswick, elections took place in March, 1865, and an anti-confederation House was elected. Some occult influence, however was at the same time quietly working to bring public opinion back to the Quebec scheme. In the session of 1866, the Legislative Council adopted a resolution similar to the one carried in the Canadian Parliament, and the Lieutenant Governor, having replied to the address of the Council favorably to the system of Confederation, and against the known feelings of his Ministry, the Cabinet resigned, a new Ministry was formed of gentlemen known for their desire to forward the cause of Confederation, and new elections took place, and resulted in forming a House in which 31 members were favorable to Confederation against eight, on a test vote.

The vacillation of opinion in New Brunswick had its effect on the adjoining Province of Nova Scotia, where the popular feeling fluctuated in rapid waves, *pro* and *con*, until 1866, when the House of Assembly resolved, by a vote of 31 to 19, that it was desirable that a Confederation of the British North American Colonies should take place.

This resolution, coupled with the votes of the Canadian Parliament, and the result of the recent elections in New Brunswick, formed the ground work of the British North America Act of 1867, as carried in the British Parliament. The Confederation was limited to the Union of the Provinces of Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick and Nova Scotia each having a separate Government and Legislature; the other Provinces were not considered to have sufficiently manifested their assent to justify the Imperial authorities in including them in the new Constitution.

The Provincial Parliament of Canada has left, in its Debates on Confederation, a useful record for future reference :—

On the 3rd February, 1865, Sir John A. Macdonald, Attorney General, in moving an Address to Her Majesty, based on the Quebec Resolutions, said :

“ The Resolutions on their face bore evidence of compromise; perhaps not one of the delegates from any of the Provinces would have propounded this scheme as a whole, but, being impressed with the conviction that it was highly desirable, with a view to the maintenance of British power on this continent, that there should be confederation and a junction of all the Provinces, the consideration of the details was entered upon in a spirit of compromise, and, after a full discussion of sixteen days, and after the various details had been voted on, the Resolutions as a whole were agreed to by a unanimous vote.” (Debates on Confederation, p. 15.)

“ In the proposed Constitution all matters of general interest are to be dealt with by the General Legislature; while the Local Legislatures will deal with matters of local interest, which do not affect the Confederation as a whole, but are of the greatest importance to their particular sections. By such a division of labor the sittings of the General Legislature would not be so protracted as even those of Canada alone. And so with the Local Legislatures, their attention being confined to subjects pertaining to their own sections, their sessions would be shorter and less expensive. (pp. 30 and 31.)

“ Then, when we consider the enormous saving that will be effected in the administration by one general government,—when we reflect that each of the five colonies has a government of its own with a complete establishment of public departments, and all the machinery required for the transaction of the business of the country,—that each has a separate executive, judicial, and militia system,—that each province has a separate ministry, including a Minister of Militia, with a complete Adjutant General's Department,—that each has a Finance Minister with a full customs and excise staff,—that each colony has as large and complete an administrative organization, with as many executive officers as the general government will have, we can well understand the enormous saving that will result from a union of all the colonies—from their having but one head and one central system. We, in Canada, already know something of the advantages and disadvantages of a Federal Union. Although we have nominally a Legislative Union in Canada, although we sit in one Parliament, supposed constitutionally to represent the people without regard to sections or localities, yet we know, as a matter of fact, that, since the Union in 1841, we have had a Federal Union; that, in matters affecting Upper Canada solely, members from that section claimed, and generally exercised, the right

of exclusive legislation, while members from Lower Canada legislated in matters affecting only their own section. We have had a Federal Union in fact, though a Legislative Union in name, and in the hot contests of late years, if on any occasion a measure affecting any one section was introduced with by the members from the other,—if, for instance, a measure locally affecting Upper Canada were carried or defeated against the wishes of its majority, by one from Lower Canada,—my honorable friend the President of the Council and his friends denounced with all their energy and ability such legislation as an infringement of the rights of the Upper Province—just in the same way, if any act concerning Lower Canada were pressed into law, against the wishes of the majority of her representatives, by those from Upper Canada, the Lower Canadians would rise as one man and protest against such a violation of their peculiar rights.” * * * * (p. 35.)

In conclusion, Sir John A. Macdonald remarked :

“ When we think of the representatives of five colonies, all supposed to have different interests, meeting together, charged with the duty of protecting those interests and of pressing the views of their own localities and sections, it must be admitted—had we not met in a spirit of conciliation, and with an anxious desire to promote this union, if we had not been impressed with the idea contained in the words of the Resolution : ‘ that the best interests and present and future prosperity of British North America would be promoted by a Federal Union under the Crown of Great Britain ’—and our efforts might have proved to be of no avail.”

The Hon. Sir E. P. Taché on the same day moved the Address to Her Majesty in the Legislative Council—then an elective body—and said :

“ That Lower Canada had constantly refused the demand of Upper Canada for representation according to population, and for the good reason that, as the Union between them would have been legislative, a preponderance of one of the sections would have placed the other at its mercy. It would not be so in a Federal Union, for all questions of a general nature would be reserved for the General Government, and those of a local character to the Local Governments, which would have the power to manage their domestic affairs as they deemed best. If a Federal Union were obtained it would be tantamount to a separation of the provinces, and Lower Canada would thereby preserve its autonomy, together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired.” (p. 9.)

The evolutions of public opinion, in given conditions, are more surprising than any change in one single mind on any question of ethics or other subject of more practical concern.

Nova Scotia, after pronouncing so decisively through her parliamentary representatives in favor of Confederation, was soon after called upon to express her opinion at the polls. The Confederation Act was passed in England, the new Federal Government was organized, and general elections ensued through the newly Confederated Provinces of Ontario, Quebec, New Brunswick and Nova Scotia. In the latter Province, 18 out of 19 constituencies elected anti-Union members.

Ontario, Quebec and New Brunswick having strongly supported the new order of things and the new Government, Nova Scotia found it a

hopeless task to oppose both, and she gradually shaped her course in accordance with the prevailing current of opinion.

The Bill for the Union of Canada, Nova Scotia and New Brunswick was presented by the Earl of Carnarvon, Secretary of State for the Colonies, in the House of Lords, and read the first time on the 12th February, 1867, without any preface or discussion. On the 19th of the same month the noble Lord, on the order of the day being read for the second reading, explained in general terms the provisions of the Bill, and presented them as a Treaty of Union, agreed upon by the consenting parties, which should not be materially varied or altered. While seeing, in a near future, the agglomeration of all the other provinces, Newfoundland, Prince Edward Island, the Western Territories, then under the rule of a trading Company, and finally of British Columbia and Vancouver Island, extending thus from the Atlantic to the Pacific, he added :

“Meanwhile let no one think lightly of the present proposed union, curtailed though it be of its original proportions. It will in area comprise some 400,000 square miles, or more than four times the size of England and Scotland; (1) it will in population contain about 4,000,000 souls, of whom 650,000 were, at the last census of 1861, men between 20 and 60 years of age, capable of bearing arms in defence of their country; and in revenue it possesses some £3,000,000.”

The rapid course of the Bill in the two Houses is explained by the presence, in London, of Colonial delegates from the four Provinces, closely watching the proceedings of Parliament, and urgently pressing its passage in their desire to bring back with them the result of their mission. The publication by the daily press of the debates and discussions on the details of the measure, superseded the necessity of a repetition of the same arguments in the House of Commons. The Under Secretary of State for the Colonies, Mr. Adderley, had charge of the Bill, and his remarks, as well as those of Mr. Cardwell, who ably supported him, embraced political, economical, and military considerations. In pointing out the advantages of the measure and demonstrating the absurdity of these contiguous Provinces retaining a system of different commercial tariffs, and thereby ruining themselves and depressing their trade, Mr. Adderley stated that the effect of the reciprocity treaty between the United States and Canada, was, to develop the commerce between these countries, in one year, from 2,000,000 to 20,000,000 dollars. That treaty, he added, has now ceased; but surely that is a reason why, at least amongst themselves

(1) When estimating the future area of the Confederation, the noble Lord sets it down at 3,400,000 square miles, and this is considered as quite an accurate estimation of the extent of the Confederation, as now completed.

(the Provinces), there should be the most perfect reciprocity." In order to show the advantages that would be derived from the projected union, Mr. Adderley cited an extract from a letter of Queen Anne to the Scotch Parliament, in 1706, on the union of England and Scotland, "because it not only shows the reasons for union, in striking language, but is a precedent for existing Legislatures being considered able to deal with a question of this sort, without any further appeal to the people." In the letter, Queen Anne said :

"An entire union will be the solid foundation of a lasting peace between you. It will remove animosities, jealousies, and differences amongst yourselves; it must increase your strength, your riches, and your trade. By this union the whole country, being joined in affection as well as resources, and free from all apprehensions of different interests, will be able to resist all its enemies. We earnestly recommend unanimity in this weighty affair, that the union may be brought to a happy conclusion. It will be the only effectual way to secure our present and future happiness, to disappoint the designs of your enemies, who will certainly use all their efforts to prevent or delay your union."

During the debate on the Address to Her Majesty in the Parliament of Canada, on 6th February, 1865, Sir John A. Macdonald referred in the following terms to the Union of England and Scotland : (p. 30.)

"The relations between England and Scotland are very similar to that which obtains between the Canadas. The union between them, in matters of legislation, is of a federal character, because the Act of Union between the two countries provides that the Scottish law cannot be altered, except for the manifest advantage of the people of Scotland. This stipulation has been held to be so obligatory on the Legislature of Great Britain that no measure affecting the law of Scotland is passed unless it receives the sanction of the Scottish members in Parliament. No matter how important it may be for the interests of the Empire as a whole, to alter the laws of Scotland—no matter how much it may interfere with the symmetry of the general law of the United Kingdom, that law is not altered, except with the consent of the Scottish people as expressed by their representatives in Parliament."

Mr. Cardwell, while expressing his opinion that the overriding and controlling power, on the part of the Central Legislature, should have been granted, as in the case of the New Zealand Act, added :

"But I think the noble Earl at the head of the Colonial Office (Lord Carnarvon) and my right hon. friend (Mr. Adderley) are perfectly right in not pressing the question more at the present moment. It is, as he justly said, not our arrangement, but theirs. It has been made by men of great ability, patience and temper, and they have done it with a perfect knowledge of the circumstances with which they had to deal."

No amendment was pressed, and the Bill, with unimportant alterations in general committee, was finally passed, embodying substantially the Resolutions of the Quebec Convention.

So far, the considerations which determined the framers of the Confederation compact, were left to be inferred, inasmuch as nothing was

done at Charlottetown, and little is known of what was said in the Quebec Convention. However, the debate, in the most important deliberative body of the Provinces, Canada, was ample and exhaustive, on every detail of the measure, and the publication of these debates leaves no room for complaint as to want of information in this respect. The general policy of the Act, as regards the Empire and the Colonies, will be found in the English and Canadian Hansards, and will always be a source of useful reading. But this work specially aims to be a legal record of precedents and opinions of statesmen on those parts of the Act which have given rise to judicial contentions, and which are liable to do so in the future.

Many of the opinions expressed in the Canadian Legislature, which will be found under the respective clauses of the Act, must be taken *cum grano salis*. They formed part of a political controversy, in which each speaker had a point to carry and a vote to give in support of his views. Much of the speaking consists of speculative prophecy. However, as there is much truth in the saying of Lamartine that poetical anticipations are the foreshadowing of history, extracts will be given under those clauses of the Act which elicited opinions from eminent statesmen, in the debates which took place in Canada.

The British North America Act, 1867.

AN ACT

FOR THE

UNION OF CANADA, NOVA SCOTIA, AND NEW BRUNSWICK,

AND THE GOVERNMENT THEREOF; AND FOR PURPOSES CONNECTED THEREWITH.

(30 VICTORIA, CAP. 3.)

[29th March, 1867.]

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be Federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom :

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire :

And whereas on the Establishment of the Union by Authority of Parliament, it is expedient, not only that the constitution of the Legislative Authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared :

And whereas it is expedient that provision be made for the eventual Admission into the Union of other Parts of British North America :

Be it therefore enacted and declared by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

The foregoing Preamble to the B. N. A. Act 1867, conforms, to the scheme of a Federal Union as projected in the first three sections of the Resolutions adopted by the Quebec Conference.

Sections 1, 2 and 3 of these Resolutions read as follows :

1. The best interests and present and future prosperity of British North America, will be promoted by a Federal Union under the Crown of Great Britain, provided such Union can be effected on principles just to the several Provinces.

2. In the Federation of the British North American Provinces, the system of Government best adapted under existing circumstances, to protect the diversified interests of the several Provinces, and secure efficiency, harmony, and permanency in the working of the Union, would be a General Government, charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections,—provision being made for the admission into the Union, on equitable terms, of Newfoundland, the North West Territory, British Columbia and Vancouver.

3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country and the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution so far as our circumstances will permit.

The Debates on Confederation in the 8th Provincial Parliament of Canada show the opinions that were entertained on such a Union.

The Hon. A. A. Dorion said :

It is evident from what has transpired, that it is intended eventually to form a Legislative Union of all the Provinces.

The Local Governments in addition to the General Government will be found so burdensome, that a majority of the people will appeal to the Imperial Government for the formation of a Legislative Union. * * *

Honorable members from Lower Canada are made aware that the delegates all desired a Legislative Union, but it could not be accomplished at once. This Confederation is the first necessary step towards it. * * *

Perhaps the people of Upper Canada think a Legislative Union a most desirable thing. I can tell those gentlemen that the people of Lower Canada are attached to their institutions in a manner that defies any attempt to change them in that way.

They will not change their religious institutions, their laws, and their language, for any consideration whatever. A million of inhabitants may seem a small affair, to the mind of a philosopher who sits down to write out a constitution. He may think it better that there should be but one religion, one language, and one system of laws, and he goes to work to frame institutions that will bring all to that desirable state; but I can tell honorable gentlemen that not even by the power of the sword, can such changes be accomplished.

If a Legislative Union of the British American Provinces is attempted, there will be such an agitation in this portion of the Province as was never witnessed before—you will see the whole people of Lower Canada clinging together, to resist by all legal and constitutional means such an attempt at wresting from them those institutions that they now enjoy. * * *

I pronounced in favor of a Confederation of the two Provinces of Upper and Lower Canada as the best means of protecting the varied interests of the two sections. But the Confederation I advocated was a real Confederation, giving the largest powers to the Local government, and merely a delegated authority to the General Government.

Mr. Dufresne (*Montcalm*) said :

I am convinced that the legislative separation about to take place under Confederation, cannot fail to have the effect of restoring French Canadian nationality to the position it occupied previous to the Union.

Mr. John Macdonald (*Toronto*) said :

I see in this scheme the introduction and increase of a large number of consumers without correspondingly increasing the producers of the country. If I err in this, I err in good company, for I quote the words of the Secretary of State for the Colonies, Mr. Cardwell, who says on this point :

A very important part of this subject is the expense which may attend the working of the Central and Local Governments.

Her Majesty's Government cannot but express the earnest hope that the arrangements that may be adopted in this respect may not be of such a nature as to increase, at least in any considerable degree, the whole expenditure, or to make any material addition to the taxation, and thereby retard the internal industry or tend to impose new burdens on the commerce of the country.

Mr. Hope Mackenzie in discussing the scheme of Confederation said :

I take it, because of that controlling power, I stand as an advocate

of national unity, and I would not accede to the principle of State sovereignty in this Confederation—the provinces delegating certain powers to the General Government and reserving the residuum of power to themselves. We have abundant evidence of the dangerous character of the doctrine of state supremacy in a Confederation. I would remind the house of the early ruin that threatened the United States under their first Constitution, which was an embodiment of this vicious principle.

The leading minds of America while the republic was yet in its infancy felt that the doctrine of State supremacy was one calculated to foster anarchy, and was sure to bring the early destruction of the fabric that they had reared. They labored to remove the evil and transfer the sovereignty to the Central Government, as their only hope of maintaining permanent peace and order, and of imparting stability to their system. I think, sir, it becomes us, in framing a constitution for these provinces, to profit not only by the early but by the later experience of our neighbors, to enquire, how far they succeeded in eradicating the evil from their new constitution, and to what extent their present troubles are chargeable to what is left in their system, of the dangerous principle referred to.

Attorney General Cartier said :

Every one who knew anything of his past public course was aware that he was opposed to the principle of representation by population while Upper and Lower Canada were under one Government. He did not regret his opposition. If such a measure had been passed, what would have been the consequence ? There would have been constant political warfare between Upper Canada and Lower Canada.

The consequence of representation by population would have been that one territory would have governed another. He had come to the conclusion that Federation was desirable and necessary. He was aware that some members of the House, and a number of people in Upper Canada, in Lower Canada and in the Lower Provinces were of opinion that a Legislative Union ought to have taken place instead of

Federal Union. He would say, however, at the outset that it was impossible to have one Government to deal with all the private and local interests of the several provinces forming the combined whole.

No other scheme presented itself but the Federation system, and that was the project which now recommended itself to the Parliament of Canada. Some parties—through the press and by other modes—pretended that it was impossible to carry out Federation, on account of

the differences of races and religions. Those who took this view of the question were in error. It was just the reverse. It was precisely on account of the variety of races, local interests, etc., that the Federation system ought to be resorted to, and would be found to work well.

Hon. John A. Macdonald said :

The third and only means of solution for our difficulties was the junction of the provinces either in a Federal or a Legislative Union. Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable. I have always contended that, if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority,—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favor by her people. We found, too, that there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as separate political organizations, as we observed in the case of Lower Canada herself. Therefore, we were forced to the conclusion that we must either abandon the idea of union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved. So that those who were, like myself, in favor of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union, as the only scheme practicable, even for the Maritime Provinces. Because, although the law of those provinces is founded on the common law of England, yet every one of them has a large amount of law of its own—colonial law framed by itself, and affecting every relation of life; such as the laws of property, municipal and assessment laws; laws relating to the liberty of the subject, and to

all the great interests contemplated in legislation ; we found, in short, that the statutory law of the different provinces was so varied and diversified, that it was almost impossible to weld them into a Legislative Union at once.

I am happy to state—and indeed it appears on the face of the Resolutions themselves—that, as regards the Lower Provinces, a great desire was evinced for the final assimilation of our laws. One of the resolutions provides, that an attempt shall be made to assimilate the laws of the Maritime Provinces and those of Upper Canada, for the purpose of eventually establishing one body of statutory law, founded on the common law of England, the parent of the laws of all those provinces.

A scheme of Confederation on a very extended scale, embracing the United Kingdom and all the British possessions, seems to be advocated by some British statesmen.

At a meeting of the Royal Colonial Institute of London, on the 20th January, 1880, when the subject of the development of Canada was under discussion, His Grace the Duke of Manchester, who presided, said :

My idea of a Federal Union is, that there should be legislation for each part of the Empire and the United Kingdom ; that there should be another Legislature, in which Canada and the United Kingdom should be represented on mutual terms for Imperial purposes, not dealing with local questions.

I think, that if there were a great Empire—a Federal Empire of England and her Colonies—that even the United States might perhaps not think it degrading to them to join the Confederation ; I think, that it is not impossible that we may yet have such a magnificent position.

In the establishment of the Federal Union under this Act, it is announced in the preamble that the nature of the Executive Government is declared, and the constitution of the Legislative authority provided for, and it appears, moreover, to be well settled law that the Crown, after having delegated the power of legislation to a local Assembly of a Colony, cannot interpose and exercise legislative powers in local matters.—(*Campbell v. Hall*, 20 Howell's S. T., p. 328 —*Bishop of Natal*, 11 Jur., N.S., part 1, p. 353.)

I.—PRELIMINARY.

1. This Act may be cited as “The British North America Act, 1867.” Short Title.

2. The Provisions of this Act referring to Her Majesty the Queen, extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland. Application of Provisions referring to the Queen.

Blackstone says (1 Com. p. 189–195) :

The Supreme Executive power of the English nation is vested in a single person, and is hereditary or descendible to the next heir on the death or demise of the last proprietor. The doctrine of hereditary right, however, does by no means imply an indefeasible right to the throne ; * * this is strictly consonant to the laws and constitution of England, as may be gathered from the expression so frequently used in the Statutes of the “ King’s Majesty, his heirs and successors.” The word “ successors,” distinctly taken, must imply that this inheritance may sometimes be broken through, or that there may be a successor without being heir of the King. And this is so extremely reasonable, that, without a power to defeat this hereditary right lodged somewhere, our polity would be very defective. * * In the King, Lords and Commons, in Parliament assembled, the laws have expressly lodged it.

It is a provision of Magna Charta, and also by special enactment (7 and 8 Will. 4, c. 25), that Parliament shall be regularly summoned by the King’s writ to assemble at a certain time and place.

But it is also enacted by 37 Geo. 3, c. 127 : “ That in case of the demise of His Majesty, his Heirs or Successors, subsequent to the Dissolution or Expiration of a Parliament, and before the day appointed by the writ of summons for assembling a new Parliament, then, and in such case, the last preceding Parliament shall immediately convene and sit at Westminster, and be a Parliament to continue for and during the space of six months, and no longer, to all intents and purposes as if the same Parliament had not been dissolved or expired,” and so in case of the demise of a successor to the Crown within six months after his succession without his having dissolved the Parliament, or after the same shall have been dissolved and before a new one shall have met. In case of the demise of the King, his heirs or successors, on or after the day appointed for the assembling, a new Parliament shall immediately after such demise convene and sit at Westminster, and be a Parliament to all intents and purposes.

II.—UNION.

Declaration
of
Union.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honorable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the name of CANADA ; and on and after that day those Three Provinces shall form and be One Dominion under that Name accordingly.

1st July
1867
Date of
Union

A Proclamation for carrying into effect this enactment for uniting the Provinces of Canada, Nova Scotia and New Brunswick into one Dominion under the name of CANADA, was given by Her Majesty at Windsor Castle on the 22nd May, 1867, Declaring, that on and after the first day of July, 1867, the said Provinces shall form and be one Dominion, under the name of CANADA.

Construction of
subsequent
Provisions of
Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation ; and in the same Provisions, unless it is otherwise expressed or implied, the name CANADA shall be taken to mean CANADA as constituted under this Act.

Four Provinces.

5. CANADA shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

Provinces of
Ontario and
Quebec.

6. The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario ; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of
Nova Scotia
and
New Brunswick,

7. The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

8. In the general Census of the Population of CANADA which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

Decennial
Census.

The following table is taken from the Statistics published by the Dominion Government. It includes Newfoundland, though she forms no part of the Dominion.

Names of Territorial Divisions.	Superficies in Square Miles.	Superficies in Square Kilomètres.
Newfoundland.....	42,000	108,775
Prince Edward Island.....	2,100	5,439
Nova Scotia.....	21,731	56,283
New Brunswick.....	27,322	70,763
Province of Quebec.....	193,355	500,789
Province of Ontario.....	107,780	279,150
Manitoba.....	14,000	36,260
British Columbia.....	356,000	922,040
Labrador, Rupert's Land and North West.....	2,465,712	6,386,194
Islands in the Arctic Ocean and Hudson's Bay..	310,000	802,900
Total.....	3,540,000	9,168,593

Names of Territorial Divisions.	Aboriginal Population.	Other Races.	Total Population.
Newfoundland (Census of 1869).....	none	146,536	146,536
Prince Edward Island (Census of 1871).....	323	93,698	94,021
Nova Scotia (Census of 1871).....	1,666	386,134	387,800
New Brunswick (Census of 1871)...	1,403	284,191	285,594
Province of Quebec (Census of 1871)	6,988	1,184,528	1,191,516
Province of Ontario (Census of 1871)	12,978	1,607,873	1,620,851
Manitoba (C. 1870)—Estimate of the Aboriginal Population).....	500	12,228	12,728
British Columbia—(Estimate of the Population).....	23,000	10,586	33,586
Labrador, Rupert's Land and the North West—(Estimate).....	55,500	5,000	60,500
Total.....	102,358	3,730,774	3,833,132

The number of the aboriginal population here assigned to the Province of Manitoba is made up only of the Indians for whom that Province constitutes the hunting and fishing territory, and which necessarily differs from that supplied by the reports and memoranda which register the population by groups assembled for Trade or Councils.

III.—EXECUTIVE POWER.

Declaration of
Executive
Power in the
Queen.

9. The Executive Government and Authority of and over CANADA is hereby declared to continue and be vested in the Queen.

The political lawyers in the several parts of the Dominion have not agreed in their conceptions of the powers delegated by the B. N. America Act, 1867, as is made manifest from the examination of the authority contained in the heading of the laws passed in the Dominion and Local Legislatures, viz :—

DOMINION.—30 Vict. Imp. c. 3 (The B. N. A. Act, 1867), Sect. 9.

“The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.”—Sect. 17 :
“There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons.”

Heading of Dominion Statutes :—

“Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada enacts as follows” :—

ONTARIO.—Sect. 69.

“There shall be a Legislature for Ontario, consisting of the Lieut.-Governor and of one House, styled the Legislative Assembly of Ontario.”

Heading of laws in Ontario :—

“Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows” :—

QUEBEC.—Sect. 17.

“There shall be a Legislature for Quebec, consisting of the Lieut.-Governor and of two Houses, styled the Legislative Council of Quebec, and the Legislative Assembly of Quebec.”

Heading of Laws in Quebec :—

“Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows” :—

The heading of Statutes in Ontario and Quebec may have been influenced by their previous constitution, the Union Act, 3 and 4 Vic., c. 35 (1840), of which sec. 3 says :

“Her Majesty shall have power, by and with the advice and consent of the Legislative Council and Assembly of Canada, to make laws for the peace and welfare and good government of the Province of Canada.”

B. N. A. Act, 1867, sec. 88:—

The constitution of the Legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act.

Heading of laws in New Brunswick:—

Be it enacted by the Lieut.-Governor, Legislative Council and Assembly, as follows:—

In Nova Scotia:—

Be it enacted by the Governor, Council and Assembly, as follows:—

In Prince Edward's Island:—

Be it enacted by the Lieutenant-Governor, Council and Assembly, as follows:—

In Manitoba:—

Her Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Manitoba, enacts as follows:—

In British Columbia, *before* Confederation:—

Be it enacted by the Governor of British Columbia, with the advice and consent of the Legislative Council thereof, as follows:—

Since Confederation:—

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

In Newfoundland:—

Be it enacted by the Governor, Legislative Council and Assembly, in Legislative session convened, as follows:—

10. The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of CANADA, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of CANADA, on behalf and in the Name of the Queen, by whatever Title he is designated.

Application of
Provisions
referring to
Governor General

Story (Com. on Cons. Sec. 524-529) remarks:

When we maintain as a fundamental maxim of Government that a separation of the three great departments of Government, the

Executive, Legislative, and Judicial, is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole, would subvert the principles of a free constitution. This was obviously the view taken of the subject by Montesquieu and Blackstone in their commentaries; for they were each speaking with approbation of a constitution of Government, which, in a general view, embraced this division of powers but which, at the same time, established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British Constitution will at once convince us that the Legislative, Executive, and Judiciary departments are by no means totally distinct and separate from each other. The Executive Magistrate forms an integral part of the Legislative department; for Parliament consists of the King, Lords and Commons: and no law can be passed except by the assent of the King. Indeed he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can impart to them a limited force and operation. He also possesses the sole appointing power to the Judicial department; though the judges, when once appointed, are not subject to his will or power of removal.

The House of Lords also constitutes, not only a vital and independent branch of the Legislature, but is also a great Constitutional Council of the Executive Magistrate, and is, in the last resort, the highest appellate judicial tribunal.

Again, the other branch of the Legislature, the Commons, possesses in some sort a portion of the Executive and Judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the House of Lords sits as a grand Court of trial for public offences. The powers of the Judiciary department are indeed more narrowly confined to their own proper sphere, yet still the judges occasionally assist in the deliberations of the House of Lords by giving their opinions upon matters of law referred to them for advice.

Each department of Government should have a will of its own, each should have its own independence secured beyond the power of being taken away by either or both of the others; but, at the same time, the relations of each to the other should be so strong that there should be

a mutual interest to sustain and protect each other. There should not only be constitutional means, but personal motives, to resist encroachments of one on either of the others. Thus, ambition would be made to counteract ambition; the desire of power, to check power; and the pressure of interest, to balance an opposing interest. There seems no adequate method of producing this result but by a partial participation of each, in the powers of the other; and by introducing into every operation of the Government, in all its branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been found by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the Legislative power upon the Executive, has been in like manner applied, by giving the latter a qualified negative upon the former; and a guard against Executive influence and patronage, or unlawful exercise of authority—by requiring the concurrence of a select council or a branch of the Legislature, in appointments to office and in the discharge of other high functions—as well as by placing the control of the revenue in other hands.

11. There shall be a Council to aid and advise in the Government of CANADA, to be styled the Queen's Privy Council for CANADA; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors; and Members thereof may be from Time to Time removed by the Governor General.

Constitution
of
Privy Council
for Canada

As shown by Blackstone (1 Comm. 229-234) the function of advising the Supreme Executive of the United Kingdom, in the discharge of his official duties, was at first assigned by law to a Council of the King's own choosing, designated as his Privy Council. But owing to their oppressive exercise of authority, as tools in the hands of a tyrannical Executive, their powers were—after the triumph of Parliamentary rule over the usurpations of the Executive—restrained and defined by Statutory enactments, and their Judicial powers were by Statute (16 Charles I c. 60) limited to Colonial and Admiralty causes, and causes arising outside the jurisdiction of the Courts of the United Kingdom, and to matters, the determination of which specially appertains to the Crown in the proper exercise of its Prerogative.

By that Statute, entitled "An Act for the regulating of the Privy Council and taking away the Court commonly called the Star Chamber,"

it was by Section 5 enacted, "that neither His Majesty, nor his Privy Council, have or ought to have any Jurisdiction, Power or Authority, by English Bill, Petition, Articles, Libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the Lands, Tenements, Hereditaments, Goods, or Chattels of any of the subjects of this Kingdom; but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the law."

The Privy Councillors were also prohibited by that Statute, under heavy penalties, from restraining any persons of their liberty by "warrants and directions," and from exercising judicial functions, by hearing and determining matters affecting the property of the subjects of the Kingdom.

The function of advising the Sovereign in the government of the Kingdom is now discharged as to all important matters of State by a select portion of this Council called the Cabinet Council, who, after being sworn in as Privy Councillors, receive their appointment to all the principal offices of State from the fact of being the leading members of the political party having the ascendancy in the House of Commons. This Cabinet Council or Ministry practically administer the Government, and become responsible for its measures, resigning their office if the Sovereign does not follow their advice, or if their political party ceases to be in the ascendancy in the House of Commons. In this way is responsibility brought home to the Executive Department, and harmony of action established between the Executive and the Legislative branches of the Government, and in this way the House of Commons is able to exercise a control over all the Departments of the Executive administration.

The King, nevertheless, has a right to dismiss his Ministry, and to appeal to the people to support a new administration. For the opposition to attempt to restrain him in the exercise of this right, and to coerce him by a majority of the existing House of Commons, would be overstepping the constitutional limit of their power. (Macaulay's Hist. of Eng. c. 20. and 2 May Cons. Hist. of Eng p. 79).

The origin of the Cabinet Council, now established as an essential feature of Parliamentary Government in England, is thus given by Macaulay:

Down to the year 1693, William III distributed the chief offices in the Government equally between the two parties, a policy which not only failed to secure the necessary co-operation of either but even allowed of open hostility between the various Ministers of

the Crown, as well in the discharge of their executive duties as in the discussions in Parliament.

The statesman who had the chief share in forming the first English Ministry was the Earl of Sunderland, whose opinion was, that as long as the King tried to balance the two great parties against each other and to divide his favor equally between them, both would think themselves illused, and neither would lend to the Government their hearty and steady support, which was now greatly needed. The King, however, hesitated long before he would bring himself to quit that neutral position which he had long occupied between the contending parties, but finally acted upon this advice, and entrusted all the chief administrative offices to the Whigs who commanded a majority in the House of Commons.

Neither William nor the most enlightened of his advisers fully understood the nature and importance of that noiseless revolution, for it was no less, which began about the close of 1693, and was completed about the close of 1696. But everybody could perceive that, at the close of 1693, the chief offices in the Government were distributed not unequally between the two great parties; that the men who held those offices were perpetually caballing against each other, haranguing against each other, moving votes of censure on each other, exhibiting articles of impeachment against each other; and that the temper of the House of Commons was wild, ungovernable, and uncertain. Everybody could perceive that, at the close of 1696, all the principal servants of the Crown were Whigs, closely bound together by public and private ties, and prompt to defend one another against every attack, and that the majority of the House of Commons was arranged in good order under those leaders, and had learned to move, like one man, at the word of command. (Hist. of Eng. c. 20.)

May, thus describes the introduction of a Cabinet Council into the Government of the Canadian Provinces.

After the reunion of the Canadian Provinces, in 1840, a remedy was sought for disagreements between the Executive and the Legislature on that principle of ministerial responsibility, which had long been accepted as the basis of Constitutional Government in England, and in 1847, Responsible Government was fully established under Lord Elgin. From that time the Governor-Generals elected their advisers from that party which was able to command a majority in the Legislative Assembly, and accepted the policy recommended by them. * *

By the adoption of this principle a colonial constitution has become the very image and reflection of Parliamentary Government in England. The Governor, like the Sovereign whom he represents, holds himself aloof from and superior to parties, and governs through constitutional advisers who have acquired an ascendancy in the Legislature.

He leaves contending parties to fight out their own battles ; and, by admitting the stronger party to his councils, brings the Executive authority into harmony with popular sentiments,—the Executive Council being a removable body, in analogy to the usage prevailing in the British Constitution,—it being understood that councillors who have lost the confidence of the Local Legislature will tender their resignations to the Governors ; and, as the recognition of this doctrine in England, has practically transferred the supreme authority of the State, from the Crown, to Parliament and the people,—so, in the Colonies, has it wrested, from the Governor and the Parent State, the direction of Colonial affairs. (2 May Cons. Hist. of Eng. p. 533.)

As a rule, says Todd (Parl. Gov. in British Colonies, p. 42) all outgoing ministers should resign their seats in the Executive Council, or be formally removed from that body. Hitherto, it has not been deemed expedient to retain ex-cabinet ministers on the list of Colonial Executive Councils merely as honorary members and in analogy to imperial practice. An organization resembling the imperial privy council, and liable to be convened, on special occasions, or for ceremonial purposes, is not ordinarily required in colonial institutions, which, at the outset at least, should be as simple and practical as possible. But in the Dominion of Canada, the practice prevails that “the Queen’s Privy Council for Canada”—the members of which are appointed by the Governor-General, “to aid and advise in the Government,” and are removed at his discretion—are nevertheless permitted to retain an honorary position in the Council after their retirement from the cabinet. By command of the Queen “members of the Privy Council, not of the Cabinet,” have a special precedence within the Dominion, and are permitted to be styled “Honourable” for life. (See same work, p. 228, for table of precedence.)

All Powers
under Acts to be
exercised by
Governor
General with
advice of Privy
Council, or
alone.

12. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in

or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of CANADA, be vested in and exercisable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for CANADA, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of CANADA.

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for CANADA.

Application of Provisions referring to Governor General in Council.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General, from Time to Time, to appoint any Person or any Persons, jointly or severally, to be his Deputy or Deputies within any Part or Parts of CANADA, and in that Capacity to exercise, during the pleasure of the Governor General, such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

Power to Her Majesty to authorize Governor General to appoint Deputies.

The following extracts from Royal Letters-Patent of 5th October, 1878, respecting the Office of Governor General with the Royal Instructions of same date

show the Powers, Authorities, and Functions that are vested in the Governor Generals of the Dominion of Canada by virtue of their office.

WHEREAS by the 12th section of "The British North America Act 1867," certain powers, authorities, and functions were declared to be vested in the Governor General: and whereas We are desirous of making effectual and permanent provision for the office of Governor General in and over Our said Dominion of Canada, without making new Letters-Patent on each demise of the said Office: Now, know ye, that,

III. We do further authorize and empower Our said Governor General to constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion, as may be lawfully constituted or appointed by Us.

IV. And We do further authorize and empower Our said Governor General, so far as we lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.

V. And We do further authorize and empower our said Governor General to exercise all powers lawfully belonging to Us, in respect of the summoning, proroguing, or dissolving the Parliament of Our said Dominion.

VI. And whereas by "The British North America Act, 1867," it is amongst other things enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor General of Our Dominion of Canada to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion, and in that capacity, to exercise, during the pleasure of Our said Governor General, such of the powers, authorities, and functions of Our said Governor General as he may deem it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions from time to time expressed or given by Us: Now, We do hereby authorize and empower Our said Governor General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion of Canada, and in that capacity to exercise, during his pleasure, such of his powers, functions and authorities, as he

may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise of any such power, authority or function by Our said Governor General in person.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor General out of Our said Dominion, all and every, the powers and authorities herein granted to him, shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under our Sign-Manual and Signet to be our Lieutenant Governor of Our said Dominion; or if there shall be no such Lieutenant Governor in Our said Dominion, then in such person or persons as may be appointed by Us under Our Sign-Manual and Signet to administer the Government of the same; and in case there shall be no person or persons within Our said Dominion so appointed by Us, then in the Senior Officer for the time being in command of Our regular troops in Our said Dominion: Provided that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor General of Our said Dominion, and in the manner provided by the Instructions accompanying these our Letters-Patent.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Dominion, to be obedient, aiding and assisting, unto Our said Governor General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters-Patent, administer the Government of Our said Dominion.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority, from time to time, to revoke, alter or amend these Our Letters-Patent as to Us or them shall seem meet.

X. And We do further direct and enjoin, that these Our Letters-Patent shall be read and proclaimed at such place or places as Our said Governor General shall think fit, within Our said Dominion of Canada.

(Dom. Sessional Papers of 1879, No. 14.)

Instructions to our Governor General in and over Our Dominion of Canada, or, in his absence, to Our Lieutenant-Governor, or the Officer for the time being administering the Government of Our said Dominion.

WHEREAS by certain Letters-Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor General (hereinafter called Our said Governor General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), and We have thereby authorized and commanded Our said Governor General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the said Letters-Patent and of such Commission as may be issued to him under Our Sign-Manual and Signet, and according to such Instructions as may, from time to time, be given to him, under Our Sign-Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion. Now therefore, We do, by these Our Instructions under Our Sign-Manual and Signet, declare Our pleasure to be that Our said Governor General for the time being shall, with all due solemnity, cause Our Commission, under Our Sign-Manual and Signet, appointing Our said Governor General for the time being, to be read and published in the presence of the Chief Justice for the time being, or other Judge of the Supreme Court of Our said Dominion, and of the members of the Privy Council in our said Dominion: And We do further declare Our pleasure to be that Our said Governor General, and every other officer appointed to administer the Government of Our said Dominion, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of Our Reign, intituled: "An Act to Amend the Law relating to Promissory Oaths;" and likewise that he or they shall take the usual Oath for the due execution of the Office of Our Governor General in and over Our said Dominion, and for the due and impartial administration of justice; which Oaths the said Chief Justice for the time being of Our said Dominion, or, in his absence, or, in the event of his being otherwise incapacitated, any Judge of the Supreme Court of Our said Dominion, shall, and he is hereby required to tender and administer unto him or them.

II. And We do authorize and require Our said Governor General, from time to time, by himself or by any other person to be authorized

by him in that behalf, to administer to all and to every person or persons as he shall think fit, who shall hold any office or place of trust or profit in our said Dominion, the said Oath of Allegiance, together with such other Oath or Oaths as may, from time to time, be prescribed by any Laws or Statutes in that behalf made and provided.

III. And We do require Our said Governor General to communicate forthwith to the Privy Council for Our said Dominion these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

IV. Our said Governor General is to take care, that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Dominion, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

V. And We do further authorize and empower Our said Governor General, as he shall see occasion, in Our name and on Our behalf, when any crime has been committed for which the offender may be tried within Our said Dominion, to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender; and, further, to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate, within Our said Dominion, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us—Provided always, that Our said Governor General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Dominion. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for Our said Dominion, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our empire, or of any country or place beyond

the jurisdiction of the Government of Our said Dominion, Our said Governor General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VI. And whereas great prejudice may happen to Our service and to the security of Our said Dominion by the absence of Our said Governor General, he shall not, upon any pretence whatever, quit Our said Dominion without having first obtained leave from Us for so doing under Our Sign-Manual and Signet, or through one of Our Principal Secretaries of State.

V. R.

(Dom. Sessional Papers of 1879, No. 14.)

ACTIONS AGAINST REPRESENTATIVES OF THE CROWN.

In *Hill & Bigge et al.* (3 Moore's P. C. 465), which was an action of debt brought against the Lieutenant-Governor of the Island of Trinidad in one of the Civil Courts of the Island, for a debt contracted before he became Governor; on the Appeal before their Lordships of the Privy Council it was contended on his behalf that he was vested with judicial as well as the executive power, so that he could do all such acts as belong to the Supreme authority acting judicially as well as executively, and that no civil action would therefore lie against him. But it was held by their Lordships, that the Governor of a Colony is liable to be sued in the Courts of his Colony.

The Counsel for Lieutenant-Governor Hill also contended, that the Governor is in the nature of a Viceroy, and of necessity part of the privileges of the King are communicated to him during the time of his Government; that no criminal prosecution lies against him, and no civil action will lie against him, and then said:—

The point has been expressly decided in Canada, in *Harvey v. Lord Aylmer* (Stuart's K. B. Rep. 542): there, an action of debt was brought against the defendant by a servant, and the claim being an account of wages, and damages for the non-payment thereof. The defendant pleaded that he was Governor of the Province of Lower Canada, and averred that so long as he continued to execute the said office and trust, no suit nor action could be had or maintained against him in any of His Majesty's Courts within the Province for any matter or thing whatsoever, and the Court allowed the exception, and dismissed the action,—Chief Justice Sewell observing, that there was no room to doubt the validity of the exception which had been filed. The Court were of the opinion that the case of *Fabrigas v.*

Mostyn (1 Cowp. p. 161, 2 W. Bl. 929) was alone sufficient to determine the question, but they cited all the authorities (among others, *Tandy v. Lord Westmoreland*), and stated two cases of a similar nature which had already been decided in the Upper Province

Lord Brougham in delivering the judgment of their Lordships said:

It is unnecessary to say anything of *Tandy v. Lord Westmoreland*, because the question there arose upon an act of the Lord-Lieutenant in his capacity of Governor, and because there would be no safety in relying upon the report of the case; it ascribes *dicta* to the Court which there is every reason to suppose must be inaccurately reported, *dicta*, in some of which it is impossible to concur.

The case of *Fabrigas v. Mostyn*, when it came by error into the King's Bench, furnishes the only thing like authority for the contention of those who seek to impeach the judgment under review, and it is not pretended that the decision is upon the point now in question. An action of trespass and false imprisonment having been brought against the Governor of *Minorca*, he pleaded: first, the general issue, and then a justification; that he had, as Governor, and in the discharge of his duty, imprisoned and removed plaintiff, to prevent and put down a riot and mutiny in which he was engaged.

To this special plea there was a replication *de injuria*, and both issues were found for plaintiff, whereupon—the defendant having tendered a bill of exceptions on the ground that the learned Judge who tried the cause ought to have directed the jury to find for the defendant, because he had acted as Governor of *Minorca*, and was not liable to be sued in the Courts of England, for acts done in *Minorca*—a writ of error was brought in K. B., and the Court gave judgment for the defendant in error (plaintiff below), holding it quite clear that an action will lie, and that the learned Judge did right in not directing the jury as required by the defendant. There having been no evidence to support the plea of justification, there could be no objection taken to the finding of the jury, and a motion for a new trial in the Common Pleas had been refused, whether made against the verdict or against the Judge's direction does not distinctly appear. Nor indeed is it quite clear from the report, in which way the Governor's Counsel really meant to shape their case; and this, though the fact that three elaborate arguments had been heard, is observed upon by the Court in passing the judgment.

This much, however, is quite certain—that the decision is not against the liability of Governor Mostyn to be sued in the Island,

during his Government, even for acts of State done by him, much less for a private debt, contracted in his individual capacity, before his Government commenced. It is only a decision that he was liable to be sued in England for personal wrongs done by him while Governor of Minorca.

Nor does the decision thus given rest upon any doctrine denying his liability to be sued in the Island. There is no doubt, a *dictum* of Lord Mansfield in giving the Judgment, that "the Governor is in the nature of a Viceroy, and that, therefore, locally during his Government no civil or criminal action will lie against him." And the reason, and the only reason, given for this position, is, because upon process he would be subject to imprisonment. With the most profound respect for the authority of that illustrious Judge, it must be observed, that, as has been shown, the Governor being liable to process during his government, would not, of any necessity follow from his being liable to action, and that the same argument might be used to show that, an action lies not, against persons enjoying undoubted freedom from arrest by reason of privilege.

But the decision in the case does not rest on this *dictum*; on the contrary, Lord Mansfield goes on to say that another reason of a different kind "would alone be decisive, and indeed the *dictum* itself is introduced as if the question had arisen upon a plea in abatement to the jurisdiction—whereas, it arose not on the pleadings, at all, as his Lordship more than once remarked. Nothing can be more clear than—the action being of a transitory nature—its being maintainable in Minorca would not have prevented it from lying in England also. It is a possibility that the expressions used may have been somewhat altered in the report; but, supposing the report is quite accurate in all respects, the decision in no way supports the contention of the appellant.

Respecting the alleged judicial powers of the Governor of Trinidad it cannot be alleged that the process runs in his name; and even if he were (which he is not) the Court of Error, that would not decide that he cannot be sued. The Judges of Courts in this country, which have the most unquestionable jurisdiction in certain actions, are themselves liable to be sued in such Courts; and cases might easily be figured in which great difficulty would arise how to try suits brought against them in consequence of their official position; but the possibility of such difficulties, whatever legislative enactments it might give rise to upon its nearer approach, can never surely be urged as a reason for denying what all men know to be the law, namely, that those parties are liable to be sued.

It may safely be affirmed that they who maintain the exemption of any person from the law by which all the King's subjects are bound * * are bound to show some reason or authority leaving no doubt upon the point. * * * Nor must we forget, in reference to the position of the Supreme power in the State, that, by our law and constitution, it is not in the Sovereign, but in the Parliament—the Sovereign himself being liable to be sued, though in a particular manner. But, it is not at all necessary that, in holding a Governor liable to be sued, we should hold his person liable to arrest while on service, that is, while resident in his Government.

In *Musgrave v. Pulido* (a very recent case decided 13th December, 1879, 28 W. R. 373) it was held by their Lordships of the Judicial Committee (following the decision in *Hill v. Bigge*) that there was no personal privilege appertaining to the office of Governor which exempted him from being sued in the Courts of the Colony of which he was Governor—that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy, nor can it be assumed that he possesses general sovereign power; that his authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him.

The Appeal was instituted by the Crown from a judgment of the Supreme Court of the Island of Jamaica, of the 6th of July, 1878.

The appellant was Sir Anthony Musgrave, K.C.M.G., Governor of Jamaica, and the suit was brought against him in November, 1877, for the recovery of £14,000 damages in trespass, for the alleged unlawful detention by the Governor or his agents of a ship called the *Florence*, of which the respondent, Senor José Ignacio Pulido, was the charterer. The declaration set forth that the ship, while on a voyage from Colon, in Columbia, to St. Thomas, put into the port of Kingston, Jamaica, in distress and for repairs, and that when she was ready to leave, the Governor and others detained her for a month, putting the respondent to great expense in procuring her release. The Governor answered that at the time of the grievances alleged there was a proclamation in force prohibiting persons from exporting or sending, among other things, gunpowder, percussion caps, arms, or ammunition of war; that such articles were found stored on board the *Florence* and were consequently detained; and that the act of detention was done in his official capacity as Governor, in the *bond fide* discharge of his duty as such, without any personal interest of his own. After this, the Governor, by his attorney, accepted service of the writ. The Court held that, assuming the existence of the right, immunity, or privilege claimed on behalf of

his Excellency, it must be considered as waived to the extent of his appearance to the action. His Excellency then pleaded formally that he was entitled, as Governor, to the privileges and exemptions appertaining to the office and its holder, and that the acts in question were done in the exercise of his reasonable discretion and as acts of State. The case was argued on demurrer before the Supreme Court on the 6th of July, 1878. The Chief Judge (Sir J. L. Smith) in giving judgment (in which Mr. Justice Ker concurred), said, in effect, that it must be taken to be established that there was no personal privilege appertaining to the office of Governor which exempted him from being sued in the courts of the colony of which he was Governor. ("Hill v. Bigge," 3 Moore's Privy Council Reports, 465.) The Governor of a colony did not represent the Sovereign generally, but had only the functions delegated to him by the terms of his commission—in other words, the Governor of a colony was not a Viceroy, but simply an officer with limited authority from the Crown. A foreign Ambassador, on the contrary, was absolutely exempt from all municipal jurisdiction by the comity of nations and the rules of international law. As to the other plea, the Chief Justice held that it failed to show how or in what way the acts complained of were to be regarded as acts of State. The demurrers were therefore allowed. From that decision the present appeal was instituted.

It was argued for the Governor that the pleas were good; that his Excellency, as Governor of the Island, was not liable to be sued in an action of trespass, or for acts done by him as acts of State; and that the demurrers admitted that the acts complained of were done by the Governor in his reasonable discretion and as acts of State. On the other hand, it was contended that there was no personal privilege exempting the Governor from being sued, and that the judgment of the Court below was correct.

Their Lordships, in their judgment, said, that as a plea of privilege claiming immunity to the Governor from liability to be sued in the courts of his colony, it could not be sustained. This was the effect of the decision of the Judicial Committee in the case of "Hill & Bigge." The plea must show by proper and sufficient averments that the acts in question were acts of State within the limits of the Governor's commission, done by him as a servant of the Crown. In other words, it must be shown that the acts, as acts of State, were not cognizable by any municipal Court. In the case of "Fabrigas v. Mostyn," the defendant, who was the Governor of Minorca, pleaded that he banished the defendant to preserve the peace of the Island and without undue violence. The

plea, however, was not proved ; but Lord Mansfield stated, that if the justification pleaded, had been shown, the Court might have considered it a sufficient answer. In the later case of "*Cameron v. Kyte*" it was decided by the Judicial Committee that the simple act of the Governor alone, unauthorized by his commission was not equivalent to an act of the Crown, and in "*Phillips v. Eyre*" it was in effect declared that, but for the Colonial Act of Indemnity, the action might have been maintained.

Let it be granted, that for acts of power done by a Governor under and within the limits of his commission he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority ; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State. When questions of this kind arise, it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor ; though it may be, that, when it is established that the particular act in question is really an act of State policy, done under authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it.

Their Lordships consequently decided that the plea of privilege raised by the defendant was unmaintainable.

In *Joly et al. & Macdonald* (23 L. C. J., 16), an injunction was issued by the Superior Court, Montreal, against the defendants (the Commissioner of Public Works and the Government Engineer), at the instance of the contractor MacDonald, to restrain them from taking possession of a public work, together with the contractor's works and property. The Defendants refused to obey the writ of Injunction and took possession of the works. A motion was then made by the Defendants to dissolve the Injunction order, while they remained in contempt, which was dismissed. On appeal from the judgment dismissing this motion :—

It was held, by the Court of Queen's Bench as one of the grounds of dissolving the Injunction (Monk and Ramsay, J.J., dissenting) that an injunction cannot issue against the Crown, or to restrain the execution of an Order-in-Council sanctioned by the Crown, and that this is a necessary consequence of the rule that the Crown cannot be sued or impleaded, at least without its own consent.

Kirk v. The Queen (L. R., 14 Eq., 558). A motion was made by a contractor for public works—who had presented a Petition of Right—for an Injunction to restrain the Secretary of State for War, pending the hearing, from preventing the suppliant completing his contract. The contract gave power to the War Office to fix the time within which any proportion of the work was to be completed, and to determine the contract in case of undue delay. Repeated warnings having been given to the contractor of dilatoriness, ultimately, notice was given to him on this ground to withdraw from the site of the works. He refused to do so, and in August, 1871, presented his petition of right, and then moved for the injunction in question. The injunction was denied.

Churchward v. The Queen (L. R., 1 Q.B., 173). The Lord Commissioners of the Admiralty, as agents of the Crown, entered into a contract with plaintiff that he should convey all the mails which would by the Commissioners, &c., “be required to be conveyed” between certain ports. Held, that this language did not imply an obligation to employ the Plaintiff to perform the service.

Held, also, that by the agreement to pay for the services a stipulated sum, out of monies to be provided by Parliament, there was no intention implied on the part of the Lords of the Admiralty to bind the Crown in the event of Parliament not providing the funds, and that consequently, the Petition of right founded upon a contract by Government officials, where there was no implied covenant to employ the contractor, was not maintainable against the Crown upon a refusal of the officials to employ him.

Neither is a servant or agent of the Crown personally responsible for the performance of a contract he has made on behalf of the Crown. *Gidley v. Lord Palmerston* (3 Brod. & Bing. 275; 7 Moore 91).

In *Canterbury v. The Queen* (7 Jur., part. 1 p. 224), which was a Petition of right in which petitioner claimed compensation from the Crown for damage done to his property by a fire caused by the negligence of the servants of the Crown—held, that a petition of right does not lie to recover compensation from the Crown for damage due to the negligence of the servants of the Crown, they alone are responsible.

Robertson v. Dumaresq (2 Moore’s P. C., N. S. 66), which came before the Supreme Court of New South Wales, in an action against the Government of that Colony, (the nominal defendant representing the Government) by an army officer having a claim against the

Government, arising upon a promise made by the Governor, of a grant of certain land in the Colony, on condition, that he would retire from the army and take up his residence in the Colony. He complied with the condition, but failed to receive the grant of the specific land promised.

The proceeding was in the nature of a Petition of right, authorized by the Local Act (20 Vict., No. 15), which recites that the remedy by Petition of right is of limited operation, and insufficient to meet all cases of dispute between individuals and the Government. The first section of the Act, enacting that, in all cases of dispute or difference touching any claim which may have arisen between the Colonial Government and any subject of the Queen, the person having such dispute or difference may present a petition to the Governor, setting forth the particulars of his claim, and that such petition may, if the Governor and Executive Council think fit, be referred to the Supreme Court for trial by a jury or otherwise, as the Court shall direct. And by sec. 2, in case of such reference, the Governor shall name some person to be a nominal defendant in the matter of such petition, the complaining party being the plaintiff therein.

In pursuance of these enactments, a petition by the plaintiff was presented and referred to the Supreme Court for trial, the defendant, who was Minister for Lands, being named under the last mentioned section to represent the Government. The Supreme Court rendered judgment in favor of plaintiff for the value, at the time of the trial, of the specific land which had been promised him by the Governor.

On appeal from the Judgment of the Supreme Court, refusing a new trial, their Lordships of the Privy Council confirmed the Judgment and dismissed the appeal.

The Sovereign is not responsible for a wrong, and cannot authorize a wrong to be done; the remedy is by action against the wrong doer. The authority of the Crown can afford no defence to an action brought for an illegal act committed by an officer of the Crown. *Feathers v. The Queen* (12 L. T., N. S., 114; 35 L. J., Q. B. 200.) Also, similar ruling in:—

Tobin v. The Queen (16 C. B., N.S., 310) where a captain in Her Majesty's Navy destroyed an innocent vessel on a mere suspicion that she was engaged in the slave trade. The owners brought a Petition of right against the Crown to recover damages, on the ground that the relation of the Queen to a captain in Her Majesty's Navy was similar

to that of a master to his servant, and that the responsibility attached to the Crown for injury sustained by his negligence. Held, that the supposed analogy fails in the following respects: First, that the Queen does not appoint a captain to a ship of her own mere will, as a master does a servant, but through an Officer of State, responsible for appointing a man properly qualified; and, secondly, that the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty; and, thirdly, because the act complained of was not done by order of the Queen, but by reason of a mistake in respect to the path of duty; and consequently, that this was not a case for a Petition of right for the reason that claims founded on *wrongs* are within a class legally distinct from claims founded on *contracts* and grants. The remedy for the wrong, if any were done, was against the person who did it, for, the civil irresponsibility of the Supreme power for tortious acts, could not be maintained with any show of justice if its agents were not personally responsible for them.

And an action will lie against the wrong-doer for a tortious or wrongful act, notwithstanding it may have had the sanction of the highest authority of the State. *Johnstone v. Sutton* (1 Durn & Easts 538).

In *Leach v. Money* (19 How. St. Trials, 1001), plaintiff, who was arrested by a King's messenger under a general warrant under the hand of Lord Halifax (Principal Secretary of State), recovered damages against the messenger for false imprisonment; it being held that general uncertain warrants were illegal.

No action will lie against a military officer for an act done in the ordinary course of his duty as such officer. *Dawkins v. Paulet* (L. R. 5 Q. B., 94).

But an action will lie for a wrongful and illegal act done by a military officer not in the exercise of military authority or in the discharge of a military duty. *Warden v. Bailey* (4 Taun. 67; 4 M. & S. 400).

An injurious act done by a naval commander, if adopted by the Government (the Secretary of State for Foreign Affairs and the Secretary of State for the Colonial Department) becomes an act of State done by authority of the Crown. The ratification by the Ministers of State of the injurious act is equivalent to a prior command. *Buron v. Denman* (2 Exch. 166).

In *Regina v. Burah* (L. R. 3 App. cases, P. C. 889). Held by their Lordships of the Judicial Committee, that section 9 of the Imperial Act (24 & 25 Vict. c. 104), for establishing High Courts of Judicature in India, which confers upon the Governor General the power to determine whether the Act or any part of it shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power; and that where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provisional Legislature, they may be exercised either absolutely or conditionally; in the latter case, leaving to the discretion of some external authority, the time and manner of carrying the legislation into effect, and the area over which it is to extend.

In *Regina v. Amer et al.* (42 U. C., Q. B. 407). Held, that the Crown by Prerogative right, before Confederation, could issue special commissions authorizing the holding of Courts of Oyer and Terminer and General Gaol Delivery in the case of the unorganized tracts of country or of the provisional judicial districts; and that the Prerogative power still exists, since the passage of the British North America Act of 1867.

It would appear by sections 12, 65, and 92 that both the Governor General and Lieutenant Governor can issue commissions of this nature.

In *Phillips v. Eyre* (22 L. T., N. S., 869). The Governor of Jamaica was held to be protected against an action in England by an act of indemnity passed by the Jamaica Legislature, and to which his own assent was necessary.

Cockburn, C. J., said: There is no ground whatever for saying that the Governor of a Colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the Sovereign of these realms could not give assent to a bill in Parliament in which the Sovereign was personally concerned.

G. H. Monk and Attorney Gen. Ouimet (19 L. C. J. 71). In this case the appellant, a mortgage creditor, contested the legal hypothec claimed by the Crown on the proceeds of a sale by the Sheriff, of certain real property of a late prothonotary of the Superior Court (Montreal). It was held by the Court that, by the laws in force in the Province of Quebec in such case, the Crown had a legal hypothec which attached to all the real property of that officer.

In a lease of Australian Crown lands, under a Leasing Act empowering the Crown to grant leases on condition that the lessee should occupy

and improve the land as directed by the Act—held by their Lordships, that the Crown, by receipt of rent after notice of a failure to perform such condition, had waived the right of forfeiture. *Davenport v. Regina* (3 L. R. 3 App. Cas. P. C. 115; 39 L. T., N. S., 7).

In re The Bishop of Natal (11 Jur. N. S., part 1, p. 353).

Held by their Lordships of the Privy Council, that, after the establishment of an independent Legislature in a Colony, there is no power in the Crown by virtue of its prerogative to establish a metropolitan see or province, or to create an ecclesiastical corporation, whose status, rights and authority the Colony could be required to recognize. After a Colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or settlement as it does to the United Kingdom. Similar ruling in:—

(*Campbell v. Hall*, 29 How. St. Trials 239).

In *The Bankers' Case* (14 How. St. Trials, 2), in which Williamson, Hornbee and others were plaintiffs, and His Majesty by his Attorney General was defendant, the plaintiff, Robert Williamson, instead of proceeding by Petition of right to the King, commenced his suit by exhibiting his Petition to the Barons of the Exchequer, setting forth his title as assignee to a portion of an annuity granted by the Crown:

Held, that a subject may have two remedies at common law to recover against the King: by Petition of right; or by *monstrans de droit*.

It appeared that the Bankers had loaned over one million of pounds sterling on the good faith of the Crown; and that the annuity in question was granted by letters patent from the Crown on the shutting up of the Exchequer in 1672 by Charles II.

The Attorney General raised the objection by demurrer, that a Petition to the Barons of the Exchequer was not a proper remedy. The Court of Exchequer gave judgment against the Crown on the demurrer; this Judgment was afterwards, on a writ of error, reversed in the Exchequer Chamber, Lord Somers holding that where the subject is in the nature of a plaintiff, his only remedy at Common Law to recover anything from the King, is to sue by Petition to the person of the King. That this was the only Common Law remedy for Crown debts. Lord Holt, dissenting, maintained that the plaintiffs had a remedy at Common Law, by Petition to the Barons of the Exchequer and also by Petition to the King, and said:

That “the remedies at Common Law to recover against the King were by Petition of *monstrans de droit* * * * * But first a Petition of right is not necessary in this case : not but that a man may proceed in this way, and admit himself out of possession if he pleaseth. But it is not necessary for two reasons :—

“First, because a Petition of right is grounded always upon a matter of fact suggested, and not of record; and upon such a suggestion, there is a commission issued out of Chancery. But here the title is derived by letters patent which are of record; so that there is no matter of fact to be enquired of.....

“Therefore, why should there be a Petition of right. I take this remedy to be by a ‘*monstrans de droit*,’ and this remedy is to be sued at Common Law, when the party’s title appeared of record.”

On appeal, the House of Lords rendered judgment reversing the judgment of the Exchequer Chamber, and sustaining Lord Holt, and execution issued upon this judgment, in the shape of a writ commanding the Treasurers of the Exchequer to pay the annuity and its arrears.

In *Attorney General v. Halling et al.*, (15 M. and W. 686) it was decided that in the Court of Exchequer as a Court of Revenue all kinds of equitable matter raised either on suggestion, petition, or plea, were dealt with and parties furnished with summary means of asserting their rights against the Crown. Similar decision in *Attorney General v. Hallett* (15 M. and W. 97).

Thomas v. The Queen (L. R. 10, Q. B., p. 31) was a case of a Petition of right under 23 and 24 Vict. c. 34, wherein the petitioner exhibited a complaint for the non-fulfilment of a contract made on behalf of the Queen by the authorized agent of the Crown.

It was held, on the authority of *The Bankers’ Case* (14 How. St. Trials p. 2):—

That a Petition of right lies as a remedy at Common Law against the Crown in respect to the non-fulfilment of a contract made by the authorized agent of the Sovereign; and that the Act 23 and 24 Vict. c. 34, only governs the procedure in Petitions of right, but does not give any right of Petition where none previously existed.

Blackburn, J., who delivered the Judgment of the Court, said, “The framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to Petitions, on contracts between subjects and the various public departments of the Government.”

PREROGATIVES OF THE CROWN.

In *Denton v. Daley* at the February term (1880) of the County Court, Digby, Nova Scotia, it was held that the power to appoint Justices of the Peace is one of the prerogatives of the Crown ;

That there is nothing in the B. N. A. Act inconsistent with the retention of this prerogative in Her Majesty's hands and the exercise of it by her duly constituted representative, the Governor General alone ;

That the power of the Lieutenant Governor is limited by his commission ; that the commission to the Lieutenant Governor of the Province of Nova Scotia does not constitute him the Deputy of the Governor General to appoint Justices of the Peace for that Province ;

That the power to appoint Justices of the Peace in the Province of Nova Scotia rests solely with the Governor General. Held, also, that the criminal law, with the administration of which the Justices of the Peace have peculiarly to deal, is a subject of exclusive legislation by the Dominion Parliament.

The facts of the case and the grounds for the decision fully appear from the following extract from the Judgment of Savary, County Judge :

On the dissolution of the former provincial Constitutions a new charter was given to the united Provinces, in which one representative of the Crown alone, under her Majesty, rules ; new and subordinate governments being accorded to the different Provinces composing the federation. The Defendant not having acknowledged the jurisdiction by appearing in the Court below, as soon as it is made clear by proper proof to the Court of Review that the gentlemen acting as Justices derive their commission not from the Governor General, but from the Lieutenant Governor, the enquiry is pertinently made, in fact forced upon us, whether the latter high functionary had the power to issue such commissions.

That such a power is one of the prerogatives of the Crown, a glance at the nature and history of the office is hardly necessary to show. We hear of the Queen's Peace, and of the honorable, and in England still much honored, title of Her Majesty's Justices of the Peace. "The sovereign" is the fountain of justice and the general conservator "of the peace." Blackstone's Com., Book 1, pages 266, 350. "Before the present constitution of Justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold ; others had it merely by itself, and were thence named *custodes or conservatores pacis*. Those that were so *virtute officii* still continue."

At length an Act of Parliament was passed in the 1st year of the reign

of Edward III. ordaining "that, for the better maintaining and keeping of the Peace in every County, good men and lawful, which were no maintainers of evil or barrators in the county, should be assigned to keep the peace. And in this manner and upon this occasion was the election of the Conservators of the Peace taken from the people and given to the king; this assignment being construed to be by the King's commission. But still they were only called conservators, wardens or keepers of the Peace, till the Statute 34 Edw. III., c. 1, gave them the power of trying felonies; and then they acquired the more honorable appellation of Justices. These Justices are appointed by the King's special commission under the great seal, *id.*, p 351." Now, as an indispensable incident to British institutions our immigrant ancestors brought with them to the colonies this office of Justice of the Peace, with the mode of appointment, and all its other incidents. Before confederation the power was vested in the Governor General as the Queen's Representative by the express terms of the Royal Commission constituting him the Governor in chief of each Province. In the commission to Lord Monck, published in full in the Journals of the House of Assembly for 1862, Appendix No. 34, p. 1, we find the following clause: No. 8. "And we do hereby authorize and empower you to constitute and appoint Judges, and, in cases requisite, commissioners of Oyer and Terminer, *Justices of the Peace*, and other necessary officers and ministers in our said Province, for the better administration of justice and putting the laws into execution." And in section 21 of the Commission we read: "And in case of your death, incapacity or *absence out of our said Province*, we do by these presents *give and grant all and singular the powers and authorities herein to you granted to our Lieutenant Governor for the time being of our said Province.*" It was under this latter clause of the Royal Commission that the Lieutenant Governors under our old Constitution appointed Justices of the Peace. Let us now consider the effect of the B. N. A. Act 1867; and in view of its provisions and policy, there are two propositions which I may lay down with equal certainty.

The first is, that the Parliament and Government of the Dominion constitute the supreme legislative and executive authority, subject only to the Imperial Parliament and Sovereign of the empire; that the former Provincial Legislatures and governments were merged in those of the Dominion; while the newly established local ones are, as it were, carved out of the latter, and are strictly limited in their powers to such as are conferred on them by the British North America Act.

The second is that, unlike the theory of the American Constitution by which the Parliaments of the various Sovereign States, or rather the sovereign people of each State, through their Representatives, conferred certain limited and defined powers upon the Federal Government and Congress, so that every power not expressly thus conferred is supposed still to reside in the different States,—that unlike this theory every authority not expressly or by necessary implication conferred upon the local governments and legislatures by the British America Act resides in those of the Dominion. Moreover, unless the Sovereign has, by express words of a Statute to which she is a party, parted with a prerogative it still belongs to her, and no presumption to the contrary can arise. These propositions are forcibly illustrated in the judgment of the Hon. Mr. Justice Gwynne in the recent case of *Lenoir vs. Ritchie* reported in *Canada Law Journal* Vol. 15, N.S., p. 314. We turn, then, to the British America Act, and, the presumption being the other way, we must seek for some express language, transferring the prerogative, or authorizing the local and subordinate Governments to exercise it. Of course we consult those clauses of the Act which relate to the executive authority. The first of these is sect. 9, simply ordaining that the Executive Government continues vested in the Queen. Then comes section 12, enacting that all powers, authorities and functions vested in or exerciseable by the then Governors or Lieutenant Governors, under Acts of certain Parliaments, are to be exerciseable by the Governor General, so far as the same continue in existence and are capable of being exercised after the union, in relation to the Government of Canada. Under sect. 14, it is competent for the Queen by Her Royal Commission to authorize the Governor General from time to time to appoint any person or persons to be his Deputy or Deputies in any part of Canada, to exercise such of his powers as he deems it expedient to assign to him or them ; but this, as will presently be seen, although authorized thereto, he has not, in relation to this matter, done. Section 64 refers to the constitution, and not to the powers of the local Executives ; and we have sect. 65 to the same effect as section 14, in respect to the exercise of the powers therein referred to, so far as the same are capable of being exercised in relation to the newly constituted Provinces.

Finally we have sect. 96, ordaining that the Governor General shall appoint the Judges of the Superior and County Courts, except the Judges of Probate of Nova Scotia and New Brunswick. In one sense, perhaps, the Court of a Justice of the Peace is as much a County Court as a Court of Probate, but, as the Act is to be construed in the

light of the then existing laws, I should confine the application of this clause to the County Courts strictly so-called, then and subsequently established. But that even this is open to some question, the dissentient opinions of the Supreme Court of New Brunswick as to the validity of a local Statute establishing Parish Courts, with jurisdiction in respect to petty debts and torts, so far as it vested the appointment of the Commissioners, or Judges of those Courts, in the Lieutenant Governor, sufficiently shows. *Ganong v. Bailey*, Stevens Dig. 274. We find, therefore, in the Act, nothing inconsistent with the retention of this prerogative in Her Majesty's hands and the exercise of it by her duly constituted representative, the Governor General alone. But we do find, as a striking illustration of where it was intended that the Sovereign legislative and executive power of Canada, should reside; that the criminal law is a subject of exclusive legislation by the Dominion Parliament; and it is with the administration of criminal law that Justices of the Peace have peculiarly to deal. Turn we now to the Royal Commissions to the Governors General of the Dominion; and we find in that to Lord Monck, published in the Sessional Papers of the House of Commons of 1867-8, Vol. 1, No. 7, paper 22, clause 3, the following: "And we do further authorize and empower you to exercise all such powers as we may be at any time entitled to exercise in respect of the constitution and appointment of Judges; and in cases requisite Commissioners of Oyer and Terminer, *Justices of the Peace* and other necessary officers and Ministers of our said Dominion of Canada, for the better administration of justice and putting the laws into execution."

By Section 9 provision is made for the exercise of his functions in case of his death, incapacity, or *absence from the Dominion*. In Section 10 of the instructions accompanying this commission, and published in the succeeding pages of the volume, it is enjoined that all commissions to be granted to any Judge, *Justice of the Peace*, or other necessary officer, unless otherwise provided by law, shall be granted during pleasure only. The corresponding clause in the commission to Sir John Young (Lord Lisgar), published in Sessional Papers of 1879, is as follows: "And we do further authorize and empower you to constitute and appoint in our name, and on our behalf, all such Judges, Commissioners, *Justices of the Peace*, and other necessary officers and Ministers of our said Dominion, as may be lawfully constituted or appointed by us."

The same clause is repeated in the Commission to the Earl of

Dufferin, laid on the Table of the House of Commons on the 15th day of February, 1875, in response to an address of that body of the 8th of the same month : and accompanying the commission appointing the present distinguished and noble Representative of the Crown to his high office, there is the draft of Letters patent, dated 5th October, 1878, passed under the great seal of the United Kingdom, constituting the office of Governor-General, and defining once for all, the powers and authorities to be exercised by His Excellency and all his successors. A copy of this document was transmitted and laid on the table of the Senate on the 19th day of February, 1879, and this instrument also contains the authority in question. Through the courtesy of the Honorable Provincial Secretary and his Deputy I have been able to peruse a certified copy of the Commission to His Honor the Lieutenant Governor ; and I find that like the new and short commission to the present Governor General, referring for the powers and authorities conferred on him to the draft Letters patent constituting the office, so this document in general terms authorises and requires him to do and execute "all things that shall belong to" his "said command and the trust" reposed in him, according to the several powers and directions granted or appointed him by virtue of this "our present commission," and of the British America Act according to the instructions therewith or from time to time given him.

The powers, therefore, conferred on His Honor are limited by the British North America Act—the charter of our constitution ; but I deferred giving judgment in this cause till I could peruse this commission, which I took for granted like those to Lord Monck before, and the Governor General since Confederation, had been made public by communication to the Legislature. For I would in its absence have felt inclined to presume that under the authority given to the Governors General pursuant to Section 14 of the British America Act, and contained in Section 8 of Lord Monck's, Lord Lisgar's, and the Earl of Dufferin's commissions, and of the Letters patent of 5th October, 1878, His Honor had been constituted His Excellency's Deputy for this Province to appoint Justices of the Peace, and perhaps also Sheriffs and Coroners, concerning the validity of whose appointment by the local authorities under the B. N. A. Act without such deputation many respectable Lawyers entertain considerable doubt ; in which, however, as it respects this Province, I do not share. See Canada Law Journal Editorial, N. S., Vol. 16, p. 44. I do not wish it to be understood that I base this decision upon that of *Lenoir v. Ritchie*, for I am alive to

the distinction between a public office or the Constitution of a Court, and the conferring of a title of honor giving rank and precedence; but the reasoning in that case is largely applicable to this.

It is worthy of note that not long after Confederation, the Legislature of New Brunswick, acting under Sub-Sections 14 and 16 of Section 92 B. N. A. Act, passed a Statute providing for the creation and appointment of Justices of the Peace, as did also the Legislature of Ontario in 1877, before the passage of which I am informed, the Government of the latter Province declined the responsibility of making such appointments.

Judgment below reversed with costs.

Appointment of Queen's Counsel.

Before the question concerning the appointment and precedence of Queen's Counsel was submitted to any Court, a correspondence in reference to the subject took place between the Minister of Justice and the Colonial Office.

No. 50, of the Dominion Sessional Papers of 1873 contains the following report (presenting the whole matter), submitted by the Minister of Justice, Sir John A. Macdonald, to the Governor General, and the answer of the Colonial Secretary, to whom the matter had been referred by His Excellency:—

OTTAWA, 3rd January, 1872.

The undersigned has the honor to report to Your Excellency that the question has been raised by the Government of the Province of Nova Scotia as to whether they have the power of appointing Queen's Counsel for the Province, their opinion being that they have no such power. The undersigned is of opinion that, as a matter of course, Her Majesty has directly as well as through her representative, the Governor General, the power of selecting from the bars of the several Provinces her own counsel, and, as *fons honoris*, of giving them such precedence and pre-audience in her Courts as she thinks proper.

It is held by some, that Lieutenant Governors of the Provinces, as they are now not appointed directly by Her Majesty, but by the Governor General, under "The British North America Act, 1867," clause 58, do not represent her sufficiently to exercise the Royal prerogative without positive statutory enactment.

This seems to have been the view of Her Majesty's Government in 1864, when they refused to confer the Pardoning power on the Lieutenant Governors.

(See despatch of Mr. Cardwell of 3rd December, 1864; also, Lord Grenville's despatch of 24th February, 1869.)

On the other hand, it is contended that the 64th and 65th clauses continue to the Lieutenant Governors the powers of appointing Queen's Counsel which they exercised while holding commissions under the great seal of England.

Reference is also made to the 63rd section, by which the Lieutenant Governors of Ontario and Quebec appoint Attorney Generals, and the Lieutenant Governor of Quebec also a Solicitor General. However this may be, it will be seen that, by the 92nd clause of the Act, it is provided that, "The Legislature of each Province may make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts."

Under this power the undersigned is of opinion that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provisions with respect to the bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

As the matter affects Her Majesty's prerogative, the undersigned would respectfully recommend that it be submitted to the Right Honorable the Secretary of State for the Colonies, for the opinion of the Law Officers of the Crown and for Her Majesty's decision thereon. The questions for opinion would seem to be :—

(1) Has the Governor General (since 1st July, 1867, when the Union came into effect) power, as Her Majesty's Representative, to appoint Queen's Counsel?

(2) Has a Lieutenant Governor appointed since that date the power of appointment?

(3) Can the Legislature of a Province confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel?

(4) If these questions are answered in the affirmative, how is the question of precedence or pre-audience to be settled?

All which is respectfully submitted,

(Signed,)

JOHN A. MACDONALD.

On 1st February, 1872, The Earl of Kimberley, Colonial Secretary, answers:—

. . . . In compliance with the request contained in despatch of the 4th January, I have taken the opinion of the Law Officers of the Crown on the questions raised therein, with regard to the power of appointing Queen's Counsel in the Provinces forming the Dominion.

I am advised that the Governor General has now, power, as Her Majesty's representative, to appoint Queen's Counsel, but that a Lieutenant Governor, appointed since the Union came into effect, has no such power of appointment.

I am further advised that the Legislature of a Province can confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel; and, with respect to precedence or pre-audience in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor General and the Lieutenant Governor as above explained. * * * KIMBERLEY.

This opinion from the Colonial Office was concurred in by the Supreme Court of Nova Scotia in a Judgment rendered on the 26th March, 1877, in the case of *P. H. Le Noir et al. & J. N. Ritchie*, in the matter of the application of J. N. Ritchie for the recognition of his rank and precedence as Queen's Counsel granted to him on the 29th December, 1872, by the Governor General, by letters patent under the Great Seal of the Dominion of Canada. The Court held that the Provincial Acts of Nova Scotia, 37 Vict. c. 20, (1874,) affirming the right of the Lieutenant Governor by Letters Patent to appoint Queen's Counsel, and (c. 21) declaring the right of the Lieutenant Governor to decide with respect to precedence in the Courts of the Province as between Queen's Counsel—are not *ultra vires*, but that the two Acts in question were not retrospective, and must be so construed as not to disturb or take away the precedence given to J. N. Ritchie by the Letters Patent already issued to him under the Seal of the Dominion of Canada (adopting the ruling in *Moon v. Duddon*, 22 Exch. 22.)

Sir William Young, C. J., in delivering the judgment of the Court said: "The Crown through its Secretary of State having authorized such enactments, the contention that the Acts are *ultra vires* is quite untenable."

An appeal was taken to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia, of the 26th March, 1877, making a rule *nisi* absolute, and granting rank and precedence to Joseph N. Ritchie over all Queen's Counsel appointed in and for the Province of Nova Scotia since the

26th day of December, 1872, and ignoring letters patent dated the 27th May, 1876, regulating the precedence of certain Queen's Counsel, including the appellants, under the provisions of Sec. 2 of c. 21 of the Act of 1874, of the Province of Nova Scotia.

A judgment, dismissing this appeal, was rendered on the 4th November, 1879 (2 L. N. 373), by the Supreme Court of Canada, composed of Strong, Fournier, Henry, Taschereau and Gwynne, J. J.—the Chief Justice taking no part in the judgment, being related to one of the parties—a majority of the Court, Strong, Fournier and Taschereau, J. J., deciding in concurrence with the Supreme Court of Nova Scotia:—

That the Acts of the Legislature of Nova Scotia were not retrospective, and must be so construed as not to disturb or take away the precedence given by the Patent issued to the respondent; and that the Letters Patent issued under the authority of those Acts were void in so far as they attempt to interfere with the privilege of the respondent.

The question of precedence and pre-audience between Mr. Ritchie and the Queen's Counsel appointed by the Lieutenant Governor of Nova Scotia being the only question submitted to the Court, the decision just given would contain the whole judgment of the Court which is authoritative in the case.

A majority of the Court, differently composed, expressed other opinions suggested by the subject discussed before them, but not submitted to them.

Thus Henry, Taschereau and Gwynne, J. J., appear to have agreed in the following opinions:—

That the Acts of the Legislature of Nova Scotia in question are *ultra vires* and void, in so far as they invest the Lieutenant Governor with the authority of appointing to the rank or dignity of Queen's Counsel, which Her Majesty by herself, or through her representative, His Excellency the Governor General, alone has the right to confer.

That Her Majesty forms no integral part of the Legislature of the Provinces as she does of the Dominion Parliament, and is no party to the laws made by the Local Legislatures, and that no Act of any such Legislatures can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers.

That the British North America Act, 1867, does not, either expressly, or by inference, divest Her Majesty of this branch of her prerogative, and confer it upon the Provincial Legislatures, or the Lieutenant Governors of the Provinces.

These opinions, being concurred in by a majority of the Court would have become precedents if submitted to them.

Having entered into the course of expressing *opinions*, the Judges by two and by one, gave their individual views on the following collateral questions,

which aimed at covering the grounds of the consultation between the Canadian Minister of Justice and the Earl of Kimberley, and also, of the opinion of Sir Win. Young, C.J., that the contention that the Acts are *ultra vires* was untenable, the Crown, through the Secretary of State, having authorized such enactments.

Per *Henry and Gwynne*, J.J.—That the said Acts do profess to invest the Lieutenant Governor with such authority, and are, therefore, *ultra vires* and void.

Per *Strong and Fournier*, J. J.—That it is unnecessary to consider the question of the constitutionality of the Acts in question; that the presumption is so much in favor of the validity of the Acts that the Court ought not to deal with the question of their constitutionality, unless the subject matter under consideration imperatively requires it.

Per *Taschereau*, J.—That the Act of the Legislature of Nova Scotia, 37 Vic., c. 20, simply authorizes the Lieutenant Governor to appoint Provincial officers connected with the administration of justice to be known under the name of "Her Majesty's Counsel learned in the law," but that does not make them of the rank and dignity of that name granted by Her Majesty. It is a mere Provincial office under that name, which the Provincial Legislature had the right to create, and the appellants are not Queen's Counsel at all, in the sense attached to the name in the respondent's commission.

The only effect of the decision of the Court is to declare that the rank claimed by Mr. Ritchie must be maintained, and the contrary claim set up by the Queen's Counsel of Nova Scotia, be disallowed; but the Queen's Counsel appointed by the several Provincial Parliaments are undisturbed by this decision and retain their rank among themselves.

The validity of their appointment may be judicially presented on some future occasion, but it has not thus far been submitted or pronounced upon with judicial authority.

Pardoning Power.

In papers, enclosed by the Earl of Carnarvon in a despatch to the Earl of Dufferin, an Australian case concerning the exercise of the Prerogative of Pardon was referred to, with the following explanations of the Royal Instructions on the subject given by the Earl of Carnarvon to Governor Sir H. Robinson.

. 5. It should, therefore, be understood that no capital sentence may be either carried out, commuted, or remitted, without a consideration of the case by the Governor and his Ministers assembled in Executive Council. A minor sentence may be commuted

or remitted by the Governor after he has duly considered the advice either of his Ministers collectively, in Executive Council, or of the Minister more immediately responsible for matters connected with the administration of justice; and whether such advice is or is not tendered in Executive Council, it would seem desirable that—whether also given orally or not—it should be given in writing.

6. Advice having thus been given to the Governor, he has to decide for himself how he will act. Acting as he does, in an Australian Colony, under a system of Responsible Government, he will allow greater weight to the opinion of his Ministers in cases affecting the internal administration of the Colony, than in cases in which matters of Imperial interest or policy, or the interests of other countries or Colonies, are involved.

9. It has, I am aware, been argued that Ministers cannot undertake to be responsible for the administration of affairs unless their advice is necessarily to prevail on all questions, including those connected with the Prerogative of Pardon. But I am led to believe that this view does not meet with general acceptance, and there is at all events one good reason why it should not. The pressure, political as well as social, which would be brought to bear upon the Ministers if the decisions of such questions rested practically with them, would be most embarrassing to them, while the ultimate consequence might be a serious interference with the sentences of the Courts.

(Dominion Sessional Papers, 1876, No. 116, p. 78.)

See also Extract from Royal Instructions to Governor General, *ante* p. 41.

Command of
armed forces to
continue to be
vested in the
Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in CANADA, is hereby declared to continue and be vested in the Queen.

It appears by the following extract from Section 10 of the "Revised Regulations for the Colonial Service," issued in 1879, "that the Governor of a Colony, though bearing the title of Captain General or Commander in Chief, is not, without special appointment from Her Majesty, invested with the command of Her Majesty's regular forces in the Colony," although "the Governor, as the Queen's Representative, will give 'the word' in all places within his Government, and the officer in command of Her Majesty's land forces is alone charged with the superintendence of all details connected with the military operations of a Colony."

By Section 19 of the Regulations it is provided "that the Regulations will

hold good though the Governor may be a military officer senior in rank to the Officer in Command of the forces." (Todd's Parl. Gov. in Colonies, p. 275.)

Duty of a Governor in case of a Rebellion.

In *Phillips v. Eyre* (22 L. T., N. S., 874; L. R. 6 Q. B., 1, affirming L. R., 4 Q. B., 225), which was an action for false imprisonment alleged to have been sustained by the plaintiff, while the defendant, as Governor of the Island of Jamaica, was engaged in putting down a rebellion; Welles, J., in delivering the Judgment of the Court remarked, as follows, upon the duty of a Governor of a Colony and other subjects of Her Majesty in case of open rebellion: "To a certain extent their duty is clear—to do their best and utmost in suppressing the rebellion, even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion. Tindal, C. J., in his charge to the Bristol Grand Jury on the special commission upon the occasions of the riots in 1832 (5 C. & P. 262), thus, in accordance with many authorities, stated the law as to private citizens, 'In the first place, by the Common Law, every private individual may lawfully endeavor of his own authority, and without any warrant or sanction of the Magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he may see coming up from joining the rest, and not only has he the authority, but it is his bounden duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace.' Such was the opinion of all the Judges in the reign of Queen Elizabeth in a case called the Case of Arms (see *R. v. Inhabitants of Wigan*, 1 W. Bl., 47); although the Judges add, that it would be more discreet for every one in such a case to attend and be assistant to the Justices, Sheriffs, or other Ministers of the King in doing this. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the Magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the Common Law. This perilous duty, shared by the Governor with all the Queen's Subjects, whether Civil or Military, is, in an especial degree incumbent upon him; as being intrusted with the powers of

Government for preserving the lives and property of the people and the authority of the Crown. And if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion, are heightened by the consideration that the existence of law itself is threatened by force of arms, and, a state of war against the Crown established for the time."

Seat of Govern-
ment of Canada.

16. Until the Queen otherwise directs, the Seat of Government of CANADA shall be Ottawa.

IV.—LEGISLATIVE POWER.

Constitution
of Parliament
of Canada.

17. There shall be One Parliament for CANADA, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

There was no moment in English history when men said, "It will be a good thing to have an Upper House to check the acts of the Lower." The system of two Houses was not the result of the design or deliberation of any man or of any body of men. It was the result of a series of accidents, of a series of historical causes, which gave to each House the particular functions which they have.

The representative body was not added in order to be a check on the acts of the non-representative body. The system of two Houses came of itself. It grew bit by bit, according to the immediate needs of successive generations. Freeman—Origin of Parliamentary Representation in England (13 Canada L. J., 67.)

The illustrious Council from which the name of Senate is derived was not an Upper House, but the government of the Roman Republic, having the executive practically under its control and the initiative of legislation in its hands. The American Senate is a special representation of the *federal*, as distinguished from the *popular* principle, in a country where, be it observed, foreign relations being in the hands of the national government, there are real federal functions to be discharged. But the other modern Senates are intended imitations of the House of Lords, and, one and all, begotten of the same illusion. The House of Lords is not a Senate, it is an old Feudal Estate, embodying not a political cast of mind different from that embodied in the House of Commons, but a different interest; and, at the dictate of that interest resisting to the uttermost every measure of change, from the Habeas Corpus Act, to the mitigation of the Criminal Code, and from the miti-

gation of the Criminal Code, to Parliamentary Reform. In no single instance, we are persuaded, can the House of Lords be shown to have discharged the supposed function of a Senate, by revising, in a calmer atmosphere and in the light of maturer wisdom, the rash resolutions of the Lower House. Its members are not older or more sedate, much less are they better informed or wiser than those of the House of Commons. They are simply members of an hereditary aristocracy maintaining the privileges of their order. For that object they readily passed the most revolutionary measure, in the worst sense of the term, recorded in the political history of England—the enfranchisement of the ignorant and irresponsible populace of the cities, by the Tory Reform Bill of 1867. Yet the belief that they are a sage council of political revision, has given birth to the double-chambered theory, with the multifarious embodiments of which, the British colonies and constitutional Europe are overspread.

Under elective institutions there can be no real power but that which rests on the suffrages of the people. Nominated Senates, such as the French Senate under the Restored Monarchy, and our Senate, are nullities with a latent possibility of mischief, which was manifested the other day by the refusal of the supplies for the purpose of a party *coup d'état*, by the Senate of Quebec. If an attempt is made to divide the real power by making both Houses elective, the result is a perpetual risk of collision, such as has twice produced a dead lock in Victoria, and in France came near the other day replunging the country in civil war.

Expectations that "the Crown" would fill the Senate with men of a different class from those who composed the Lower House—men superior in any mental or social qualifications, less involved in the faction fight, better fitted to represent commercial interests or scientific professions—were foredoomed to inevitable disappointment. "The Crown" is the Prime Minister; and no Prime Minister who was at the head of a party could help doing what the Prime Ministers on both sides have done—bestowing the nominations as rewards for party services, and making the Senate, what it is, a political infirmary.

In England a peerage is now and then given for military or naval services, seldom for public services of any other kind; and an extra law lord has sometimes been created when the House, as a Court of Law, has been in absolute need of reinforcement. Otherwise, the only road to a peerage is through landed wealth and a long course of steady voting for the leader of a party.

Not in complications, rivalries and conflicts, is the necessary Conservative influence to be found, but, in the proper constitution of a single assembly ; in requiring such qualifications on the part of its electors, filling it up by such instalments, so regulating its legislative procedure that it may be an organ of intelligence, not of passion, and give effect to the settled convictions, not to the transient impulses, of the people. Then, instead of making the executive authority the prize of a perpetual faction fight, let an executive council be regularly elected by Parliament. The separation of the executive power from the legislative is a dream, though Montesquieu has established the belief that it is one of the great securities for liberty. Already Parliament appoints the Government, but in a way which makes it the government of a party, not of the nation.

Of what sort of men is the Upper House specially to consist ? We have gone through projects without number, and volumes of discussion, yet we have never met with an answer to this essential question. Electoral or nominative machinery of all kinds is constructed, but nobody seems to know, or think it necessary to determine, what the machinery is to produce. Is the Upper House to be composed of old men ?—It will be impotent. Of rich men ?—It will be odious. Of the best and wisest men ?—The Lower House, which, as the more popular, remains the more powerful, will be left destitute of its natural guides and controllers. From this quandary, we really see no escape. However, the principle of two chambers is established, and we take it as it is. The only way of giving the Senate real power, and making it a living institution, is to introduce the elective principle ; and this, so far as we can see, must be done in one of two ways, either by giving the election of Senators to the Local Legislatures, or by giving it to the people of each Province. Much might be said in favour of the Local Legislatures, if they were what they ought to be, genuine local councils, consisting of the worthies of the districts, and if their members would vote freely. But, as it is, to give the election of senators to them would be to put it into the pocket of the leader of the party in power, which would be very much the reverse of an improvement on open and legal nomination by the Prime Minister of the Dominion. To the people of each Province then, apparently, the election must be given ; and we must hope that the largeness of the constituencies will, to some extent, baffle wirepulling, and that, petty local influences being swamped, the feeling which the people always have for eminent leaders will prevail. The substitution of a term of

years for life-tenure is a matter of course: it is necessary, both to secure a rotation of elections, and as a practical ordinance of superannuation. If the present Senators are allowed to retain their seats, the change will be gentle, and all fear of revolution, if anybody is so nervous as to entertain it, will be removed.—“Bystander,” Toronto,—May, 1880, p. 64.

18. The Privileges, Immunities, and Powers to be held, <sup>Privileges, &c.,
of Houses.</sup> enjoyed, and exercised by the Senate and by the House of Commons and by the members thereof respectively, shall be such as are from Time to Time defined by Act of the Parliament of CANADA, but so that *the same shall never exceed those at the passing of this Act* held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

The Parliament of Canada acting in the execution of the powers conferred by this Section (18) passed an Act (31 Vict. c. 23) defining their privileges.

By this Act, their Privileges, Immunities and Powers were defined “to be the same as at the time of the passing of said recited (B. N. A. Act, 1867) Act were held, enjoyed and exercised by the Commons House of Parliament, &c.”

By an Imperial Act (28 & 29 Vict. c. 63) passed 29th June, 1865, “to remove doubts as to the validity of Colonial Laws,” it was enacted that “every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make Laws respecting the constitution, powers and procedure of such Legislature; provided that, such Laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law, for the time being in force in the said Colony.”

By Imperial Act 38 & 39 Vict. c. 38 (see 39 Vict. Can. p. iv.), —entitled, An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under Section 18 of the B. N. A. Act, 1867—that section was repealed without prejudice to any thing done thereunder and a new section substituted in its place. The new section differs from the repealed section by the leaving out the words in italics, “*the same shall never exceed those at the passing of this,*” and the substitution, in their place, of the words, “*any Act of the Parliament of Canada defining such Privileges, Immunities and Powers shall not confer any Privileges, Immunities or Powers exceeding those at the passing of such.*”

It did not clearly appear in the suppressed clause whether the word “this” referred to the Imperial Act of Confederation enacting the suppressed clause, or to the Dominion Act defining the Privileges, &c., of the Houses of the Dominion Parliament.

The text of the Amending Act is as follows :

38—39 *Victoria*, Chap. 38.

AN ACT

TO REMOVE CERTAIN DOUBTS WITH RESPECT TO THE POWERS OF
THE PARLIAMENT OF CANADA UNDER SECTION EIGHTEEN
OF THE BRITISH NORTH AMERICA ACT, 1867.

[19th July, 1875.]

30 & 31 Vict. c. 8

WHEREAS by Section Eighteen of The British North America Act, 1867, it is provided as follows :

“ The Privileges, Immunities and Powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof : ”

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in Pursuance of the said section, the said Privileges, Powers, or Immunities ; and it is expedient to remove such doubts :

Be it therefore enacted by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Substitution of
New Section for
Section 18 of 30
& 31 Vict. c. 8.

1. Section Eighteen of the British North America Act, 1867, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed.

The Privileges, Immunities and Powers to be held, enjoyed and exercised by the Senate and by the House of

Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such Privileges, Immunities and Powers shall not confer any Privileges, Immunities or Powers exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.

2. The Act of the Parliament of Canada passed in the thirty-first year of the Reign of Her present Majesty, chapter twenty-four, intituled "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament," shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada.

Confirmation
of Act of Parlia-
ment of Canada,
81 & 82 Vict. c.
24.

3. This Act may be cited as "The Parliament of Canada Act, 1875."

Short Title.

No action has been taken by the Dominion Parliament in pursuance of the power conferred by this new section.

The corresponding section in the Constitutional Act of Victoria has received the Judicial construction of their Lordships of the Privy Council, in *Dill v. Murphy*, (1 Moore's P.C., N.S., 487). By section 35 of the Constitution Act of the Colony of Victoria (18 & 19 Vict. c. 55) the Legislature were authorized in language similar to section 18 of the B. N. A. Act "by any Act or Acts to define the Privileges, Immunities, and Powers, to be held enjoyed and exercised by the Council and Assembly, and by the members thereof respectively: Provided, that no such privileges, immunities or powers shall exceed those now (i.e. at the passing of the Constitution Act) held and enjoyed by the Commons House of Parliament or the members thereof." And in pursuance of that power enacted that their Privileges, Immunities and Powers should be the same as at the passing of the Constitution Act were held, exercised and enjoyed by the Commons House of Parliament, &c. It was held by their Lordships, that this enactment had properly defined those privileges and sufficiently exercised the power delegated to the Local

Legislature, and that the privilege of arrest for contempt was rightly exercised under that Act. Also in

The Speaker of the Legislative Assembly of Victoria v. Glass (L. R. 3 P. C., 564.) It was held by their Lordships, as to matters connected with contempt, under Section 35 of the Constitutional Act of the Colony of Victoria and the Colonial Act defining the powers of the Legislature; that the Privileges and Powers of the Imperial House of Commons at the time of the passing of the Constitutional Act were carried over to the Legislative Assembly of the Colony, including the privilege of judging what is contempt, and the power of committing for contempt by a warrant stating generally that a contempt had taken place without setting forth the specific grounds of such commitment.

In *Kielley v. Carson et al.* (4 Moore P. C. 75) it was held that a Colonial House of Assembly (of the Island of Newfoundland) does not possess the power of arrest with the view to adjudication upon a complaint of contempt, as an incident to its functions; and that it has not the same exclusive privileges which the ancient Law of England has annexed to the Imperial House of Parliament; and that such power must be expressly given by the Imperial Statute creating the Colonial Legislature.

Mr. Baron Parke, in delivering the Judgment remarked: "It is said, however, that this power belongs to the House of Commons in England, and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription, the *lex et consuetudo Parliamenti* which forms a part of the Common Law of the land, and according to which the High Court of Parliament before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishment for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption, by the Council of the Island, of the power of commitment (exercised by the House of Lords), as well as in support of the right of impeachment by the Assembly, a claim for which there is not any color of foundation.

Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions

whatever; and it is to be remarked that all those bodies which possess the power of adjudication upon and punishing in a summary manner, contempts of their authority, have judicial functions; and exercise this power as incident to those functions which they possess, except only the House of Commons, whose authority in this respect rests upon ancient usage.

The case of *Beaumont v. Barrett* (1 Moore's P. C. 59) was overruled by this decision, and this decision was followed in *Fenton v. Hampton* (11 Moore's P. C. 347).

In *Doyle* (Speaker of the House of Assembly of Dominica) & *Falconer* (L. R., 1 P. C. 328), their Lordships held, following the case of *Kielly & Carson*, that the Legislative Assemblies in the British Colonies, in the absence of express grant, have no power to punish for contempts committed in their presence or beyond their walls, for the reason that this is the exercise of a judicial power. Sir James W. Colville, who delivered the judgment of their Lordships, said:—It must be conceded that the Common Law sanctions the exercise of the prerogative by which the Assembly has been created, and that the principle of the Common Law, which is embodied in the maxim "*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa, esse non potest*" applies to the body so created. But it is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a Legislative body during its sitting, which last power is necessary for self-preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed, or excluded for a time, or even expelled.

In *Landers v. Woodworth* (2 Can. S. C., 158) it was held, on appeal, affirming the Judgment of the Supreme Court of Nova Scotia, that the Legislative Assembly of the Province of Nova Scotia, in the absence of express grant, has no power to remove one of its members for contempt unless he is actually obstructing the business of the House, following in this respect the ruling of their Lordships of the Privy Council in the cases above cited.

In *Stockdale v. Hansard*, (9 Ad. & El., p. 1); Held—

1. That a Court of Law is competent to determine whether or not the House of Commons has such privileges, as will support a defence to an action against a publisher for libel.

2. That the established laws of the land cannot be superseded by a Resolution of either House alone, and that the House of Commons by ordering a report to be printed cannot legalize the publication of libellous matter.

In consequence of this ruling the Imperial Parliament legalized by an Act (3 & 4 Vict. c. 9) all publications ordered to be printed by either House.—Broom (Cons. Law, p. 893) says:—

However flagrant the contempt, the House of Commons can only commit till the close of the existing Session (*Stockdale v. Hansard*, 9 Ad. & El., p. 1). Their privilege to commit is not better known, than this limitation of it, and, though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every Court in Westminster Hall, and every judge of all the Courts, would be bound to discharge him on *Habeas Corpus*.

In *Burdett v. Abbott*, 14 East 158, (affirmed in the House of Lords,) where the action was for false imprisonment, it was held that the House of Commons being a competent adjudicating Court to commit for contempts, the adjudication could not be inquired into by another Court. Lord Ellenborough, in delivering judgment, said:—The power of the House of Commons to commit for contempt, stands upon the ground of reason and necessity independent of any positive authorities on the subject. It is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgment of the Courts of Law in a long course of well established precedents and authorities. (Affirmed, 5 Dow, 199.)

It also appears by the following authorities that even the Judiciary, in the administration of justice, can only punish for contempts in accordance with the established procedure in the case of criminal offences. In *re Pollard* (L. R., 2 P.C., 106),—one of Her Majesty's Counsel at the Colony of Hong Kong, whose case was, on petition, referred by the Crown to the Judicial Committee—it was held by their Lordships that no person should be punished for contempt of Court—which is a criminal offence—unless the specific offence charged against him be distinctly stated, and an opportunity given to him of answering it before passing sentence.

Similar rulings in *Rainy v. The Justice of Sierra Leone* (8 Moore's P. C., 47) and *in re Thomas K. Ramsay* (7 Moore's P. C., N. S., 273).

See Sect. 70, opinion of Sir John A. Macdonald as to the effect of omission of any provision similar to Sect. 18 for Provincial Legislatures.

First Session of
the Parliament
of Canada.

19. The Parliament of CANADA shall be called together not later than Six Months after the Union.

20. There shall be a Session of the Parliament of CANADA Yearly Session of the Parliament of Canada. once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

The Senate.

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two members, who shall be styled Senators. Number of Senators.

Section 147 provides for the admission of Newfoundland and Prince Edward Island into the Union with four members in the Senate for each, and in that case reducing the representation of Nova Scotia and New Brunswick to 10 Senators respectively, and making the normal number 76, with the possibility of an increase to 82, under section 26.

Manitoba was admitted, in 1870, with 2 Senators, and British Columbia was admitted in 1871, with 3 Senators, the total number of Senators being now 77.

22. In relation to the constitution of the Senate, CANADA Representation of Provinces in Senate. shall be deemed to consist of Three Divisions :

1. Ontario ;
2. Quebec ;

3. The Maritime Provinces, Nova Scotia and New Brunswick ; which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators ; Quebec by Twenty-four Senators ; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A to Chapter One of the Consolidated Statutes of Canada.

It will be remarked that, except in the Province of Quebec, the Senators represent no particular localities in their Provinces. But electoral divisions are determined, for each Senator in the Province of Quebec, and the consequences of that distinction, which cannot be otherwise than detrimental, are developed in sub sec. 6 of the following section :

Qualifications
of Senator.

23. The qualifications of a Senator shall be as follows :

- (1.) He shall be of the full Age of Thirty years :
- (2.) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of CANADA after the Union :
- (3.) He shall be legally or equitably seized as of freehold for his own use and benefit of Lands or Tenements held in Free and Common Soccage or seized or possessed for his own use and benefit of Lands or Tenements held in *Franc-alleu* or *in Roture*, within the Province for which he is appointed, of the Value of Four thousand dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same :
- (4.) His Real and Personal property shall be together worth Four thousand dollars over and above his Debts and Liabilities :
- (5.) He shall be resident in the Province for which he is appointed :
- (6.) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

[See Sections 11, 61 and 128 as to following requirements.]

THE FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I, *A. B.*, do swear, that I will be faithful and bear true allegiance to Her Majesty Queen Victoria.

NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland, for the time being, is to be substituted from time to time, with proper terms of reference thereto.*

DECLARATION OF QUALIFICATION.

I, *A. B.*, do declare and testify, that I am by law duly qualified to be appointed a member of the Senate of Canada [or as the case may be], and that I am legally or equitably seized as of freehold for my own use and benefit of lands or tenements held in free and

common socage [or seized or possessed for my own use and benefit of lands or tenements held in franc-alien or in roture (*as the case may be*), in the Province of Nova Scotia (*or as the case may be*) of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances, due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements, or any part thereof, for the purpose of enabling me to become a member of the Senate of Canada (*or as the case may be*), and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

s.s. 1. The age of 30, for Senators, was that required for elective Legislative Councillors in the Province of Canada, at the time of the Union.

s.s. 2. This mode of making British subjects of aliens, ignores a more easy process, by Courts of law provided for in every Province of the Dominion. Owing to the impossibility of surmounting such obstacles persons eminently competent for the position will, in all probability, be kept out of the Senate, awaiting an act of Parliament to qualify them; when for any other position or office in the gift of the Government, they would find no such requirement interposed as a condition of fitness.

The same reasons which require a property qualification for electors has been assigned for requiring a property qualification for those elected to office. Blackstone says (vol 1, p. 171. Com.):

The true reason of requiring any qualification with regard to property in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes they would be tempted to dispose of them under some undue influence or other.

The soundness of the reasoning of Blackstone has been challenged by practical legislation, with apparent success, in several countries. Universal suffrage exists in most of the United States, in France, in Switzerland and in other countries.

As regards those elected, no real or personal property qualification is required in England of the members of the House of Commons. In a despatch from the Duke of Newcastle to the Governor General of Canada, some years before the Union, the Duke urged the propriety of removing any property qualification as regards the candidates for election, and preserving it for the elector, and also writing to the Governor of P. E. I. in 1862 the noble Duke suggested the adoption of the same policy for the constitution of the Upper House of that Island. The basis in Canada of the qualifications of the members of a Senate, not nominated by the people, could not be other than a property qualification. But the limited amount required (\$4,000) and the dubious character given to the property by s.s 3, and s.s 4, shows how perplexed were the framers of the constitution, when adopting even that low figure.

In every other part of the Dominion except the Province of Quebec, it is a matter of indifference where the possible Senator resides, provided it be in

the Province for which he is appointed, (s.s 5) and where his property is situated. In Quebec the Senator must either have his property qualification in the electoral division for which he is appointed, or he must be a resident in that division. There would be some reasonable ground for this distinction if, on account of a peculiar training, the class of men from whom Senators may be chosen, were more numerous in Quebec than anywhere else. Unfortunately the contrary state of things prevails. There are not to be found, in the Province of Quebec, the numerous interior cities and towns, which exist in Ontario, and perhaps in other provinces, where, manufacturing or commercial pursuits and municipal institutions are developing that extended amount of practical knowledge, which is necessary to fit men for public and parliamentary life. The result may not, at once be produced of an inferior class of Senators representing the Province of Quebec, but it is inevitable in the future, because, instead of the wide field of selection offered in other provinces, the senators from Quebec will have to be taken out of a very restricted class of candidates.

In the Debates on Confederation in the Prov. Parl. of Canada (p.89), Mr. George Brown said:—

It is objected that in the constitution of the Upper House, so far as Lower Canada is concerned, the existing electoral divisions are to be maintained, while, as regards Upper Canada, they are to be abolished; that the members from Lower Canada are to sit as representing the divisions in which they reside or have their property qualification, while in Upper Canada there is no such arrangement.

Undoubtedly this is the fact; it has been so arranged to suit the peculiar position of this section of the province. Our Lower Canada friends felt that they had French Canadian interests and British interests to be protected, and they conceived that the existing system of electoral divisions would give protection to these separate interests. We, in Upper Canada, on the other hand, were quite content that they should settle that among themselves, and maintain their existing division if they chose. But, so far as we in the west were concerned, we had no such separate interests to protect, we had no diversities of origin or language to reconcile, and we felt that the true interest of Upper Canada, was, that her very best men should be sent to the Legislative Council, wherever they might happen to reside, or wherever their property was located. If there is one evil in the American system which in my mind stands out pre-eminently as its greatest defect, except universal suffrage, it is, that under their constitution the representatives of the people must reside in the constituencies for which they sit. The result is, that a public man, no matter what his talent or what his position, no matter how necessary it may be for the interest of the country that he should be in public life, unless he happens to belong

to the political party popular for the time being in the constituency where he resides, cannot possibly find a seat in Congress. And over and over again have we seen the very best men of that Republic, the most illustrious names recorded in its political annals, driven out of the legislature of their country, simply because the majority in the electoral division in which they lived was of a different political party from them. I do think the British system infinitely better than that, securing, as it does, that public men may be trained to public life, with the assured conviction that, if they prove themselves worthy of public confidence and gain a position in the country, constituencies will always be found to avail themselves of their services, whatever be the political party to which they may adhere."

24. The Governor- General shall from Time to Time, in the Queen's name, by Instrument under the Great Seal of CANADA, summon qualified persons to the Senate; and, subject to the Provisions of this Act, every person so summoned shall become and be a Member of the Senate and a Senator.

Summons of
Senator.

25. Such persons shall be First summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Summons of
First Body
of Senators.

Mr. Bright, discussing in the House of Commons that part of the scheme which substituted a Senate appointed by the Crown for an elective body, said:

With regard to this particular case, the right hon. gentleman said, "it is to be observed that Canada had had a nominated Council, and had changed it for an elected one, and surely they had a right, if they pleased, to go back from an elected Council to a nominated Council." Well, no body denies that; but nobody pretends, that the people of Canada prefer a nominated Council to an elected Council. And all the wisdom of the wise men to whom the right hon. gentleman, the Member for Oxford (Mr. Cardwell) has referred in such glowing terms,—unless the experience of present and past times goes for nothing,—is but folly, if they have come to the conclusion that a nominated Council on that continent must be better than an elected Council. Still, if they wish it, I should not interfere and prevent it. But I venture to say that the clause enabling the Governor General and his Cabinet to put seventy-two men in that Council for life, inserts into the whole scheme the germ of a malady which will spread, and which,

before very long, will require an alteration of this Act and of the constitution of this new Confederation.

In another part of his speech Mr. Bright said :

I regret very much that they have not adopted another system with regard to their Council or Senate, because I am satisfied—I have not a particle of doubt in regard to it—that we run a great danger of making this Act work ill almost from the beginning. They have the example of 36 States in the United States in which the Senate is elected, and no man, however sanguine, can hope that seventy-two stereotyped Provincial Peers in Canada will correspond and work harmoniously, with a body elected upon a system so wide and so general as that which prevails in the States of the American Union.

The Hon. A. A. Dorion in the Debates on Confederation (p. 570) referring to the proposed constitution of the Federal Legislative Council or Senate, said :—

I assert that, by appointing them for life and limiting their number, an absolute authority will be created, which will be quite beyond the control of the people and even of the Executive; that the power of this body will be so great, that they will always be in a position to prevent every reform, if they thought proper, and that a collision between the two branches will be inevitable and irremediable.

The danger arising from the creating of such a body, is exactly that of being obliged to destroy it, if they resist too obstinately the popular demands.

(p. 255) With a Governor General appointed by the Crown; with Local Governors appointed by the Crown; with Legislative Councils, in the general Legislature and in all the Provinces nominated by the Crown; we shall have the most illiberal Constitution ever heard of, in any country where Constitutional Government prevails.

If the two Canadas were alone interested, the majority would have its own way, would look into the Constitution closely, would scan its every doubtful provision, and such a proposal as this about the Legislative Council, would have no chance of being carried, for it is not very long since the House, by an overwhelming majority, voted for the substitution of an elected, for a nominated Upper Chamber. In fact the nominated Chamber had fallen so low in public estimation—I do not say it was from the fault of the men who were there, but the fact is nevertheless as I state it—that it commanded no influence.

Remember, Sir, that after all, the power, the influence of the popular branch of the Legislature is paramount. We have seen constitutions

like that of England adopted in many countries; and, where there existed a nobility, such as in France in 1830, the second chamber was selected from this nobility. In Belgium, where the Constitution is almost a *fac-simile* of that of England, but where there is no aristocracy, they adopted the elective principle for the Upper House.

26. If at any time on the Recommendation of the Governor General, the Queen thinks fit to direct that Three or Six members be added to the Senate, the Governor General may by Summons to Three or Six qualified persons (as the case may be), representing equally the Three Divisions of CANADA, add to the Senate accordingly.

Addition of Senators in certain cases.

27. In case of such Addition being at any time made, the Governor General shall not summon any person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of CANADA is represented by Twenty-four Senators, and no more.

Reduction of Senate to Normal number.

28. The Number of Senators shall not at any time exceed Seventy-eight.

Maximum number of Senators.

Langmead says :

An extraordinary creation of peers, is, to the House of Lords, what a dissolution, is, to the House of Commons. (Eng. Cons. Hist., p. 671.)

Hon. A. A. Dorion, in the Debates on Confederation (p. 254) said, in speaking of the British House of Lords :—

Their number may be increased on the recommendation of the responsible advisers of the Crown, if required to secure united action or to prevent a conflict between the two Houses. It must be fresh in the memory of many members of this House how long the House of Lords resisted the popular demand for reform, and how great difficulties were threatened. At last, in 1832, the agitation had become so great that the Government determined to nominate a sufficient number of peers to secure the passage of the Reform Bill. The members of the House of Lords had to choose between allowing the measure to become law, or see their influence destroyed by the addition of an indefinite number of members. They preferred the first alternative, and thereby quieted an excitement, which if not checked in time, might have created a revolution in England.

In a despatch to the Earl of Kimberley, on the 26th January, 1874, Lord Dufferin enclosed a report of the Privy Council, approved by His Excellency on 23rd December, 1873, the report is in the following terms :

On a memorandum, dated 22nd December, 1873, Hon. Mr. Mackenzie reported that, under the 26th Section of "the B. N. A. Act, 1867," on the recommendation of the Governor General, Her Majesty may direct that three or six senators be added to the Senate ; that, in his opinion, it is desirable in the public interests that six additional senators should be named under that provision. And he, therefore, recommended that Her Majesty be requested to direct that six members be added to the Senate.

The Earl of Kimberley, on the 18th February, 1874, answered ; that after careful examination of the question, which was one of considerable importance, he was satisfied that the intention of the framers of the 26th Section of "The British North America Act, 1867," was, that this power should be vested in Her Majesty, in order to provide a means of bringing the Senate into accord with the House of Commons, in the event of an actual collision of opinion between the two Houses.

That Her Majesty could not be advised to take the responsibility of interfering with the constitution of the Senate, except upon an occasion when it had been made apparent that a difference had arisen between the two Houses of so serious and permanent a character that the Government could not be carried on without Her intervention, and when it could be shown, that the limited creation of senators allowed by the Act would apply an adequate remedy.

That this view was strongly confirmed by the provisions of the 27th Section, which show that the addition to the Senate is only to be temporary, and that the Senate is to be reduced to its usual number as soon as possible, after the necessity for the exercise of the special power has passed away ; that, in consequence, he could not advise Her Majesty to direct the proposed addition to the Senate. (Dom. Sess. Papers of 1877, No. 68.)

Tenure of place
in Senate.

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

In the Debates on Confederation in the Provincial Parliament of Canada, (p. 89), Mr. George Brown said :

That the limitation of the numbers in the Upper House lies at the base of the whole compact on which the scheme rested. It was perfectly clear, as was contended by those who represented Lower Canada

in the Conference, that, if the number of the Senators were made capable of increase, this would sweep away the whole protection they had from the Upper Chamber. But it has been said that, though you may not give the power to the Executive to increase the numbers of the Upper House in the event of a dead-lock, you might limit the term for which the members are appointed. I was myself in favor of that proposition. I thought it would be well to provide for a more frequent change in the composition of the Upper House, and lessen the danger of the Chamber being largely composed of gentlemen whose advanced years might forbid the punctual and vigorous discharge of their public duties. Still, the objection made to this was very strong. It was said: "Suppose you appoint them for nine years, what will be the effect?" For the last three or four years of their term they would be anticipating its expiring and anxiously looking to the Administration of the day for re-appointment, and the consequence would be, that a third of the members would be under the influence of the Executive." The desire was to render the Upper House a thoroughly independent body, one that would be in the best position to canvas dispassionately the measures of the other House, and stand up for the public interests in opposition to hasty or partisan legislation. It was contended that there is fear of a dead-lock. * * The British House of Peers itself does not venture *à l'outrance* to resist the popular will, and can it be anticipated that our Upper Chamber would set itself rashly against the popular will? If any fear is to be entertained in the matter, is it not rather that the Councillors will be found too thoroughly in harmony with the popular feeling of the day?

30. A Senator may, by Writing under his Hand, addressed to the Governor General, resign his Place in the Senate, and thereupon the same shall be vacant. Resignation of place in Senate.

31. The Place of a Senator shall become vacant in any of the following Cases : Disqualification of Senators.

1. If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate :
2. If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen of a Foreign Power :

3. If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter :
4. If he is attainted of Treason, or convicted of Felony or of any infamous Crime :
5. If he ceases to be qualified in respect of Property or of Residence ; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of CANADA while holding an Office under that Government requiring his Presence there.

Summons on
Vacancy in Se-
nate.

32. When a Vacancy happens in the Senate, by Resignation, Death, or otherwise, the Governor General shall, by Summons to a fit and qualified person, fill the Vacancy.

Questions as to
Qualifications
and Vacancies
in Senate.

33. If any Question arises respecting the qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

41 V. c. 5 (Dom.) being an Act for securing the independence of Parliament makes an important difference between the members of the House of Commons and the Senators. Any person filling an office of emolument under the Government (except of course the Ministers), or having any contract with the Government cannot sit in the House of Commons ; while a Senator is not compelled to vacate his seat on entering into a contract with the Government, but simply incurs a penalty of \$200 for every day during which the contract is in existence.

Appointment of
Speaker of
Senate.

34. The Governor General may from time to time, by Instrument under the Great Seal of CANADA, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

Quorum of
Senate.

35. Until the Parliament of CANADA otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Se-
nate.

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of One hundred and eighty-one members, of whom Eighty-two shall be elected for Ontario, sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

Constitution
House of
Commons in
Canada.

In 1872, by the Dominion Act, 35 V., c. 13, the representation in the House of Commons was readjusted on account of new census returns.

The Provinces are now (1880) represented as follows.

Province of Ontario.....	88
“ Quebec.....	65
“ Nova Scotia.....	21
“ New Brunswick.....	16
“ Prince Edward Island.....	6
“ British Columbia.....	6
“ Manitoba.....	4

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38. The Governor General shall from time to time, in the Queen's Name, by Instrument under the great Seal of CANADA, summon and call together the House of Commons.

Summoning
of House of
Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Sensors not to
sit in House
of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:—

Electoral Dis-
tricts of the four
Provinces.

1.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2.—QUEBEC.

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

[See First Schedule on next page.]

3.—NOVA SCOTIA.

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4.—NEW BRUNSWICK.

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

THE FIRST SCHEDULE.

Electoral Districts of Ontario.

A.

EXISTING ELECTORAL DIVISIONS.

COUNTIES.

1. Prescott.	6. Carleton.
2. Glengarry.	7. Prince Edward.
3. Stormont.	8. Halton.
4. Dundas.	9. Essex.
5. Russell.	

RIDINGS OF COUNTIES.

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.
22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

CITIES, PARTS OF CITIES, AND TOWNS.

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

B.

NEW ELECTORAL DIVISIONS.

44. The Provisional Judicial District of Algoma.

The County of Bruce divided into Two Ridings, to be called respectively the North and South Ridings :—

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albemarle, Amabel, Arran, Bruce, Elderslie and Langeen, and the Village of Southampton.

46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinross, Culross and Carrick.

The County of Huron, divided into Two Ridings, to be called respectively the North and South Ridings :—

47. The North Riding to consist of the Townships of Ashfield, Wawanoah, Turnberry, Howick, Morris, Grey, Colborne, Hullet, including Village of Clinton and McKillop.

48. The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Osborne and Stephen.

The County of Middlesex, divided into Ridings, to be called respectively the North, West, and East Ridings :—

49. The North Riding to consist of the Townships of McGillivray and Bidduiph (taken from the County of Huron) and Williams East, Williams West, Adelaide and Lobo.

50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalf, Mosa, and Ekfrid, and the Village of Strathroy.

(The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present),

51. The County of Lambton to consist of the Townships of Bosanquet, Warwick, Plymton, Sarnia, Moore, Enniskillen and Brooke, and the Town of Sarnia.

52. The County of Kent to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.

53. The County of Bothwell to consist of the Townships of Sombra, Dawn and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of Grey, divided into Two Ridings, to be called respectively the South and North Ridings :—

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton and Melancthon.

55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak, and Brooke, and the Town of Owen Sound.

The County of Perth, divided into Two Ridings, to be called respectively the South and North Ridings :—

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.

57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and Ste. Marys.

The County of Wellington, divided into Three Ridings, to be called respectively North, South, and Centre Ridings :—

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.

59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.

60. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of Norfolk, divided into Two Ridings, to be called respectively the South and North Ridings :—

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, with the Gore thereof.

62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.

63. The County of Haldimand to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Raynham, Walpole, and Dunn.

64. The County of Monck to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunville (taken from the County of Haldimand), the Townships of Caistor and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

65. The County of Lincoln to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catharines.

66. The County of Welland to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.

67. The County of Peel to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetville.

68. The County of Cardwell to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of Simcoe, divided into Two Ridings, to be called respectively the South and the North Ridings:—

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseh, Innisfil, Essa, Toscorontio, Mulmar, and the Village of Bradford.

70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Floa, Oro, Medonte, Orillia, and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of Victoria, divided into Two Ridings, to be called respectively the South and North Ridings:—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.

72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Somerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of Peterborough, divided into Two Ridings, to be called respectively the West and East Riding:—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Eunismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee, and Snowdon, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of Hastings, divided into Three Ridings, to be called respectively the West, East and North Ridings:—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

78. The County of Lennox to consist of the Townships of Richmond, Adolphustown, North Fredericksburg, South Fredericksburg, Ernest Town, and Amherst Island, and the Village of Napanee.

79. The County of Addington to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Uxo, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough and Bedford.

80. The County of Frontenac to consist of the Townships of Kingston, Wolfe Island, Pittsburgh and Howe Island, and Storrington.

The County of Renfrew, divided into Two Ridings, to be called respectively the South and North Ridings:—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Gratton, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not specially mentioned in this Schedule, is to be taken as part of the County or Riding within which it is locally situate.

[The Representation was re-adjusted under Section 51 by]

35 VICT., CAN. c. 13.

An Act to re-adjust the Representation in the House of Commons.

[Assented to 14th June, 1872]

WHEREAS, by the Census of the year one thousand eight hundred and seventy-one, and in accordance with the "*British North America Act, 1867*," the Province of Ontario is entitled to six additional members in the House of Commons, the Province of Nova Scotia to two additional members, and the Province of New Brunswick to one addi-

tional member, the same being severally in excess of the number of members of the House of Commons for each of the said Provinces, as provided by the British North America Act, 1867: And whereas it is expedient otherwise to re-adjust the boundaries of certain of the electoral districts; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. The House of Commons shall consist of Two hundred members, of whom Eighty-eight shall be elected for Ontario, Sixty-five for Quebec, Twenty-one for Nova Scotia, Sixteen for New Brunswick, Four for Manitoba, and Six for British Columbia.

2. The Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, shall, for the purposes of the election of Members to serve in the House of Commons, continue to be divided into the Electoral Districts established by the "*British North America Act, 1867*," each represented as it now is, except where altered by this Act, as follows, that is to say:—

ONTARIO.

1. The County of Huron shall be divided into three Ridings, to be called respectively the North, the Centre and the South Riding, each of which shall be an Electoral District and shall return one member;

The North Riding to consist of the Townships of Howick, Ashfield, West Wawanosh, East Wawanosh, Morris and Turnberry;

The Centre Riding to consist of the Townships of Colburne, Hullet, McKillop, Tuckersmith, Grey, the Town of Goderich and the Village of Seaforth;

The South Riding to consist of the Townships of Goderich, Stanley, Hay, Stephen, Usborne and the Village of Clinton.

2. The County of Grey shall be divided into three Ridings to be called respectively the North, the East, and the South Riding, each of which shall be an Electoral District, and shall return one member;

The North Riding to consist of the Townships of Holland, Sullivan, Sydenham, Derby, Sarawak, Keppel and the Town of Owen Sound;

The East Riding to consist of the Townships of Proton, Melancthen, Osprey, Artemisia, Collingwood, Euphrasia and St. Vincent;

The South Riding to consist of the Townships of Normanby, Egremont, Bentinck, and Glenelg.

3. The Townships of Morrison, Ryde, Muskoka, Draper, Oakley, Wood, Monck, Macauley, McLean, Medora, Watt, Stephenson, Brunel, Humphrey, Cardwell, Süsted, Chaffey, Christie, Monteith, McMurrich, Matchitt, Ryerson, Spence, McKellar, McDougall, Ferguson, Carling, Hagerman, Croft, Chapman, Ferrie, Mackenzie, Wilson, Brown, Blair, Mowatt, Cowper, Conger, Parry Island, Parry Sound, Aumick Lake Territory, Maganetawan, and all other surveyed townships lying North of the North Riding of Victoria, and south of the Nipissing District, shall form the Electoral District of Muskoka, and shall return one member.

4. The City of Toronto shall be divided into three Electoral Districts, to be called respectively West Toronto, East Toronto and Centre Toronto, each of which shall return one member:

West Toronto to consist of the wards, as at present constituted, of St. Andrew, St. George and St. Patrick;

East Toronto to consist of the wards, as at present constituted, of St. David and St. Lawrence;

Centre Toronto to consist of the wards, as at present constituted, of St. John and St. James.

5. The City of Hamilton shall return two members.

6. The City of Ottawa shall return two members.

7. The County of Haldimand shall consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Rainham and Walpole.

8. The County of Monck shall consist of the Townships of Canborough, and Moulton and Sherbrooke and Dunn, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caistor and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

9. The County of Wellington shall be divided into three Ridings, to be called respectively the North, Centre and South Riding, each of which shall be an Electoral District, and shall return one member;

The North Riding to consist of the Townships of Maryborough, Minto, Arthur, Luther and Amaranth, and the Villages of Mount Forest and Arthur;

The Centre Riding to consist of the Townships of Pilkington, Elora, Nichol, Fergus Garrafraxa West, Garrafraxa East, Peel and the Village of Orangeville;

The South Riding to consist of the Townships of Puslinch, Guelph, Eramosa and Erin, and the town of Guelph.

10. The North Riding of the County of Victoria shall include and consist of the same Townships as it did before the passing of this Act, except those included by this Act in the Electoral District of Muskoka.

11. The Townships of Hagarty, Richards, Sherwood, Burns and Jones, shall be added to, and included in the South Riding of the County of Renfrew.

QUEBEC.

1. So much of sub-sections twenty-six and twenty-seven, of section one of chapter, seventy-five of the Consolidated Statutes for Lower Canada, intituled, "*An Act respecting the division of Lower Canada into counties, and the Boundaries of certain cities and towns for the purpose of Representation in the Legislature*," as refers to the limits of the Counties of Quebec and Portneuf, is hereby amended, and the parish of St. Felix of Cap Rouge, as erected for civil purposes by Proclamation of the Lieutenant Governor of the Province of Quebec, bearing date the Eleventh day of March, in the year of Our Lord One Thousand Eight Hundred and Seventy-two, shall form part of the County of Quebec, in so far as relates to the election of Members of the House of Commons of Canada, and every part of the said Parish which, at the time of the passing of this Act, was included in the County of Portneuf, shall be detached from the County of Portneuf, and shall be attached to the County of Quebec, for the electoral purposes hereinbefore set forth.

2. The City of Montreal shall be divided into three Electoral Districts to be called respectively Montreal West, Montreal Centre, and Montreal East, each of which shall return one member;

Montreal West to consist of the wards, as at present constituted, of St. Antoine and St. Lawrence;

Montreal Centre to consist of the wards, as at present constituted, of St. Ann, West Ward, Centre Ward and East Ward;

Montreal East to consist of the wards, as at present constituted, of St. Lewis, St. James and St. Mary.

NOVA SCOTIA.

The counties of Cape Breton and Pictou shall each return two members.

NEW BRUNSWICK.

The Electoral District of the City and County of St. John, as now existing, shall return two members.

MANITOBA.

1. The Electoral District of Selkirk, shall consist of and comprise, of the Provincial Electoral divisions recently established by the proclamation of the Lieutenant Governor of Manitoba, for the Legislative Assembly of Manitoba, those known as:—

Headingley, or No. 8;

Saint Charles, or No. 9;

Saint James, or No. 10;

St. Boniface, West and East, or Nos. 11 and 12;

Winnipeg and Saint John, or No. 18;

Kildonan, or No. 19;

And shall return one member.

2. The Electoral District of Provencher shall consist of all the settlements on the Red River, and in the neighborhood lying between the south line of the Electoral District of Selkirk and the frontier of the United States, including the Settlements on the Seine, at Oak Point, or St. Anne, and shall return one member.

3. The Electoral District of Lisgar shall consist of all the settlements on the Red River and in the neighborhood between the north Line of the Electoral District of Selkirk and the northern frontier of the Province, including those at Broken Head River, and shall return one member.

4. The Electoral District of Marquette, shall consist of all the settlements on the Assiniboine and Lake Manitoba, and all other settlements to the westward of the western line of the Electoral District of Selkirk, and shall return one member.

BRITISH COLUMBIA.

1. The Electoral District of New Westminster shall consist of "New Westminster District" and the "Coast District," as defined in a public notice issued from the Lands and Works Office in the said Colony, on the 15th day of December, one thousand eight hundred and sixty nine, by the desire of the Governor, and purporting to be in accordance with the provisions of the thirty-ninth clause of the "Mineral Ordinance, 1869," and shall return one member.

2. The Electoral District of Cariboo shall consist of "Cariboo District" and "Lillooet District," as specified in the said public notice, and shall return one member.

3. The Electoral District of Yale shall consist of "Yale District" and "Kootenay District," as specified in the said public notice, and shall return one member.

4. The Electoral District of Victoria shall consist of those portions of Vancouver Island, known as "Victoria District," "Esquimalt District" and "Metchosin District," as defined in the official maps of those districts which are in the Land Office, Victoria, and are designated respectively, "Victoria District Official Map, 1858," "Esquimalt District Official Map, 1858," and "Metchosin District Official Map A. D. 1858," and shall return two members.

5. The Electoral District of Vancouver shall consist of all the remainder of Vancouver Island, and all such Islands adjacent thereto, as were formerly dependencies of the late Colony of Vancouver Island, and shall return one member.

3. This Act shall take effect upon, from, and after the termination of this present existing Parliament.

41. Until the Parliament of CANADA otherwise provides, all Laws in force in the several Provinces at the Union, relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of Controverted Elections, and Proceedings incident thereto, the Vacating of Seats of Members, and the Execution of new writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several provinces.

Continuance of existing Election Laws until Parliament of Canada otherwise provides.

Provided that, until the Parliament of CANADA otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of CANADA to vote, every Male British Subject, aged Twenty-one years or upwards, being a Householder shall have a Vote.

See Sections 84 & 129.

42. For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

Writs for First Election.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Mem-

bers to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union, by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

As to Casual
Vacancies.

43. In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act, shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to Election
of Speaker of
House of
Commons.

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up
Vacancy in
Office
of Speaker.

45. In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to
preside.

46. The Speaker shall preside at all Meetings of the House of Commons.

Provision in
case of absence
of Speaker.

47. Until the Parliament of CANADA otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons, for a Period of Forty-eight consecutive hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall, during the Continuance of such Absence of the Speaker, have and execute all the Powers, Privileges and Duties of Speaker.

Quorum of
House
of Commons.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

49. Questions arising in the House of Commons shall be decided by a Majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a Vote. Voting in
House
of Commons.

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General) and no longer. Duration of
House
of Commons.

51. On the Completion of the Census in the Year One thousand eight hundred and seventy-one, and of each subsequent Decennial Census, the Representation of the Four Provinces shall be re-adjusted by such authority, in such manner, and from such time, as the Parliament of CANADA from time to time provides, subject and according to the following Rules: Decennial Re-
adjustment of
Representation

1. Quebec shall have the fixed Number of Sixty-five Members :
2. There shall be assigned to each of the other Provinces, such a Number of Members as will bear the same proportion to the Number of its Population (ascertained at such Census) as the Number sixty-five bears to the Number of the Population of Quebec (so ascertained) :
3. In the Computation of the Number of Members for a Province, a Fractional Part, not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded ; but a Fractional Part, exceeding One Half of that Number, shall be equivalent to the Whole Number :
4. On any such Re-adjustment, the Number of Members for a Province shall not be reduced, unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of CANADA at the then last preceding Re-adjustment of the Number of Members for the Province, is

ascertained at the then latest Census to be diminished by one-twentieth part or upwards :

5. Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

See Sect. 37.

Increase of
Number
of House of
Commons.

52. The Number of Members of the House of Commons may be, from Time to Time, increased by the Parliament of CANADA, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes ; Royal Assent.

(See Sect. 90.)

Appropriation
and Tax Bills.

53. Bills for appropriating any part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation
of
Money Votes.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost, to any purpose that has not first been recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

The first clause of the 7th Section of Art. 1 of the Constitution of the United States provides that :

“ All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills.” Story says (2 Com. U.S. Const., sect. 871). This provision, so far as it regards the right to originate, what are technically called *money bills*, is, beyond all question, borrowed from the British House of Commons.

Blackstone (1 Comm. 169) says : “ The true reason for this exclusive privilege of the House of Commons, arising from the spirit of our Constitution, seems to be this : the Lords, being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the Crown, and when once influenced to continue so, than the Commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject ; it is

sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants; but so unreasonably jealous are the Commons of this valuable privilege, that herein they will not suffer the other House to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill; under which appellation are included all bills by which money is directed to be raised upon the subject, for any purpose or in any shape whatever."

On the 7th of May, 1868, it was decided by Speaker Cockburn :

That the standing order of the House of Commons, England, declaring: "That this House will receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the Public Revenue, whether payable out of the Consolidated Fund or out of the moneys to be provided by Parliament, unless recommended from the Crown," should be held in force in the House of Commons, Canada. No. 155, Speaker's Decisions, H. of Com. of Can.

On the 19th April, 1869, it was decided by Speaker Cockburn :

That a petition for the construction of a public work concluding with the prayer "that Your Honorable House will take such measures as will cause the obstructions to the navigation of the Ottawa River to be removed," is a petition asking simply for legislation, and is not a petition asking for money.

No. 157, Speaker's Decisions of H. of Com. of Can.

On the 10th April, 1871, it was decided by Speaker Cockburn :

That a claim for damages against the Government may be referred to a select Committee; but if their report should recommend the payment of money, it cannot be concurred in by the House, unless upon the recommendation of the Governor General.

No. 189, Speaker's Decisions, H. of Com. of Canada.

On 26th February, 1875, it was decided by the Speaker :

That an amendment to change the destination of a grant of money recommended by the Crown, was out of order.

No. 219, Speaker's Decisions, H. of Com. of Canada.

On 27th May, 1875, it was decided by the Speaker :

That petitions praying for the passing of an Act authorizing the Commissioner of Customs to grant an exemption from duty cannot be received unless recommended by the Crown, as they involve a public charge.

No. 225, Speaker's Decisions, H. of Com. of Canada.

On 5th April, 1870, it was decided by Speaker Cockburn, that a bill from the Senate containing clauses respecting public expenditure was not open to the objection that such provisions could not originate in the Senate, when the last clause provided “that nothing in this Act shall give authority to the Minister to cause expenditure until previously sanctioned by Parliament.” (No. 172 Speaker’s Decisions, House of Commons of Can.)

See Todd on Parl. Gov. in Col. (pp. 478-489) for full account of disputes over “Money Bills,” between the Upper and Lower Houses of the Legislatures of South Australia and Tasmania, and for an interesting narration of the “dead lock” in Victoria, and also of the protracted contest in New Zealand, owing to the evenly balanced state of parties in the Legislature.

Royal Assent to
Bills, etc.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen’s Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty’s Instructions, either that he assents thereto in the Queen’s Name, or that he withholds the Queen’s Assent, or that he reserves the Bill for the Signification of the Queen’s pleasure.

Disallowance
by Order in
Council of Act
assented to by
Governor
General.

56. Where the Governor General assents to a Bill in the Queen’s name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty’s Principal Secretaries of State, and if the Queen in Council, within Two Years after receipt thereof by the Secretary of State, thinks fit to Disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him), being signified by the Governor General by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of
Queen’s
pleasure on Bill
reserved.

57. A Bill reserved for the Signification of the Queen’s pleasure shall not have any Force, unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen’s assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament, or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of CANADA.

V.—PROVINCIAL CONSTITUTIONS.

Executive Power.

58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of CANADA. Appointment of Lieutenant Governors of Provinces.

59. A Lieutenant Governor shall hold office during the pleasure of the Governor General ; but any Lieutenant Governor appointed after the commencement of the first session of the Parliament of CANADA shall not be removable within Five years from his appointment, except for Cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by Message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not, then within one week after the commencement of the next session of the Parliament. Tenure of Office of Lieutenant Governor.

In Lenoir & Ritchie, 3 Can. Supreme Court R., p., the following distinction was made by one of the Judges in commenting on the respective powers of the Executive of the Dominion Parliament and of the Provincial Legislatures.

Gwynne, J., said :

By the 91st Section it is declared that the Acts of the Dominion Parliament shall be made by the Queen, by and with the advice of the Senate and House of Commons, treating the Queen herself as an integral part of the Parliament ; whilst the 92nd Section enacts that the '*Legislatures*' of the respective Provinces—that is to say the Lieutenant Governor and the Legislative Assembly in Provinces having but one House, and the Lieutenant Governor and the Legislative Council and Assembly in Provinces having two Houses—shall make laws in relation to matters coming within certain enumerated classes of subjects to which their jurisdiction is limited.

Nothing can be plainer, as it seems to me, than that the several Provinces are subordinate to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures.

The use of Her Majesty's name by those Provincial authorities is, by the Act, confined to the summoning and calling together the Legislatures.

The head of their Executive Government is not an officer appointed by Her Majesty, or holding any Commission from Her or in any manner personally representing Her, but an officer of the Dominion Government appointed by the Governor General, acting under the advice of a Council which the Act constitutes the Privy Council of the Dominion.

The Queen forms no part of the Provincial Legislatures as she does of the Dominion Parliament; the Provincial Legislatures consist in some Provinces of such subordinate executive officers and of a Legislative Assembly and in others of such executive officers and of a Legislative Council and Assembly.

On the 25th July, 1879, the Hon. Luc Letellier de St. Just, Lieut. Governor of the Province of Quebec, was informed by the Dominion Under Secretary of State that, by an order of His Excellency-in-Council, passed on the same day, he was removed from his office, and that the cause assigned for such removal, in conformity with the provisions of the 59th Section of the B. N. A. Act of 1867, was, that after the vote of the House of Commons of the last session and that of the Senate during the preceding session, relative to his conduct as Lieutenant Governor, his usefulness as such had ceased. (See No. 68 of Dominion Sessional Papers of 1868.)

At a meeting of the members of the Royal Colonial Institute held at London, on the 20th January, 1880, His Grace the Duke of Manchester, who presided, remarking upon the clauses of the B. N. A. Act, (sec. 58 and 59) which provide that the Lieutenant Governors of the Provinces were to be appointed by the Governor General *by the advice* of his Ministers, but were to be removable by the Governor General *without any advice* from his Ministers on the subject, said:—

“I think that, by the power of removal being limited to the Governor General without the advice of the Constitutional Ministry, it was intended that he should not be governed by political questions on that point or by local political questions of the Dominion, and that it should be a purely judicial function—that the Lieutenant Governors of the Provinces should only be removed for misgovernment or incapacity—but that all political questions should be kept clear of the question of the tenure of office by the Lieutenant Governors of Provinces.

It seems to me that the object of making this difference was that, although the appointment of a Lieutenant Governor might be a political appointment—when it is made on the advice of the Dominion Ministry,

the removal of a Lieutenant Governor of a Province should not be a political act, but should be entirely independent of Dominion local politics."

These views had been considered by the Imperial Government, and answered in a despatch of the Secretary of State for the Colonies of 3rd July, 1879, in which we read :

" It has been noticed that while, under section 58 of the Act, the appointment of a Lieutenant Governor is to be made " by the Governor-General-in-Council by instrument under the great seal of Canada," section 59 provides that " a Lieutenant Governor shall hold office during the pleasure of the Governor General," and much stress has been laid upon the supposed intention of the Legislature in thus varying the language of these sections. But it must be remembered that other powers vested in a similar way by the statute in the Governor General were clearly intended to be, and in practice are, exercised by and with the advice of his Ministers ; and, though the position of a Governor General would entitle his views on such a subject as that now under consideration to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing in this instance from the general rule, and declining to follow the decided and sustained opinion of his Ministers, who are responsible for the peace and good government of the whole Dominion, to the Parliament, to which, according to the 59th section of the statute, the cause assigned for the removal of a Lieutenant Governor, must be communicated." * * * * " It will be clearly borne in mind that it was the intention of the British North America Act, 1867, that the tenure of the high office of Lieutenant Governor should, as a rule, endure for the term of years specially mentioned, and that not only should the power of removal never be exercised except for grave cause, but that, the fact that the political opinions of a Lieutenant Governor had not been during his former career, in accordance with those held by any Dominion Ministry who might happen to succeed to power during his term of office, would afford no reason for its exercise."

Mr. Todd, in his work on *Parliamentary Government in the British Colonies*, takes the same views as the Imperial and Dominion Governments as regards the duty of the Governor General to act on the advice of his Cabinet in the dismissal of a Lieutenant Governor ; but says (p. 415) :

" By the B. N. A. Act of 1867, the Crown transferred to the central Dominion Government and Parliament the measure of control previously exercised by the Mother Country over the respective provinces ;

and since their confederation the Imperial Government has declined to interfere directly in questions of local concern in the Provinces. But this concession to the Federal Government of Imperial rights over the Provinces simply places that Government in the position towards the Provincial Governments heretofore occupied by the Crown. It does not increase or diminish the relative powers of either in respect to local affairs. This principle has been unreservedly established as regards Provincial legislation. It is well understood that each Province retains 'exclusive' rights of legislation within its assigned jurisdiction, that may not be interfered with by the Dominion Government, save only when Dominion interests or the public welfare in general might be injuriously affected by such legislation.

The same principle applies with equal force to acts of administration. The spirit and intent of the B. N. A. Act equally forbid unnecessary interference by the Dominion Executive with Provincial rights in all matters of local self-government.

This explains why a restraint is imposed by that Statute upon the prerogative right of dismissing a Lieutenant Governor.

Such functionaries cannot be removed at pleasure, as freely as the Sovereign is at liberty to remove a colonial Governor. The Act secures them against any such arbitrary exercise of the prerogative. They are only removable within five years of their appointment 'for cause assigned, which shall be communicated by message to the Senate and House of Commons' at the earliest possible period.

The object of this proviso is manifestly to guard against a removal for insufficient cause, and to afford a guarantee to the Provinces that their chief Executive officer shall not be removed for any reason that would impair or infringe upon the cherished right of local self-government.

But what, it may be asked, would be a sufficient cause for such a proceeding?

Undoubtedly, if a Lieutenant Governor overstepped his lawful powers he would be properly subject to dismissal.

Or if he exercised his lawful powers in an improper and partial manner.

But, let the sufficient cause be what it may, it is clear that the responsibility for the act of removal devolves upon the Governor General in Council; and that the initiatory step to that end should proceed from thence.

To permit the initiative in such a momentous proceeding to be

undertaken by either House of Parliament would be an undue interference with Executive responsibility. It would weaken the just authority of the Crown, and produce a result for which no one could be held actually responsible.

Herein, it is obvious that the Dominion Government was at fault in the procedure against Governor Letellier.

They had abstained, as a government, from calling M. Letellier to account. And when the two Houses of Parliament had passed resolutions calling for his removal, the Premier informed the Governor General that, in the opinion of Ministers, 'it was not at all necessary, in order to justify their advice, to go behind the vote of Parliament:

. . . even if their opinion had been adverse to that arrived at by Parliament, it seems clear that they are bound to respect that decision, and to act upon it, as they have done, by advising the removal.'

This statement involves a complete abnegation of Ministerial responsibility, and a surrender of the safeguards over individual rights which Ministerial responsibility is intended to afford.

We are therefore compelled to conclude that the action taken for the removal of Lieutenant Governor Letellier was at variance with constitutional law and precedent, as well as contrary to the spirit and intent of the British North America Act; inasmuch as it was initiated by Parliament and not by the Executive Government, and did not set forth the particular acts of misconduct for which his removal was deemed to be necessary.

If we go behind the formal resolutions of Parliament, and inquire into the reasons urged by the advocates of these resolutions for their adoption, we find it alleged, as a primary motive to justify the dismissal of the Lieutenant Governor, that, by his dismissal of his Ministers at a time when they were able to command a majority in Parliament, he had exercised an arbitrary and obsolete power, which was incompatible with the recognition of Responsible Government. The leader of the Opposition in the Commons, in advocating the adoption of the resolution against Governor Letellier, said that, 'in England the power of dismissal of a Government having the confidence of Parliament is gone forever, and that, if it were gone there, it ought never to have been attempted to be introduced into a colony under the British Crown.'

It is scarcely necessary to point out that this rash and ill-considered declaration has no warrant either in theory or practice. . . . The reserved powers of the Crown, which, like all prerogatives, are held in trust for the benefit of the people, clearly include the right

of appealing, at all times, from a Ministry, strong (it may be) in the possession of the confidence of the existing Parliament to the electorate, whose decision must ultimately prevail. Meanwhile the Crown is constitutionally competent to dismiss any Ministry in whom the Sovereign is no longer able to confide, and invite the assistance of other Ministers who are willing to be responsible for this act of the Crown. To deny to the Sovereign the possession of these reserved powers, however seldom it may be needful to exercise them, would be, in effect, to destroy the strength and vitality of the Monarchy.

And this is equally true of the powers of a Governor in the colonies of Great Britain.

The right of a Governor or Lieutenant Governor to dismiss his Ministers, when he has ceased to have confidence in them, is undeniable; and that right is not impaired by the fact of their being able to command a majority in the Representative Chamber. This principle has been repeatedly affirmed in colonies under Responsible Government (see p. 432 *et seq.* of same work), and it is now placed beyond the reach of cavil by the corroborative testimony of Her Majesty's Secretary of State for the Colonies in the Letellier case, that 'there can be no doubt that the Lieutenant Governor of a province has an unquestionable constitutional right to dismiss his Ministers if, from any cause, he feels it incumbent upon him to do so.'

This abstract right being admitted, we may go further and declare that it is the bounden duty of a Governor to dismiss his Ministers if he believes their policy to be injurious to the public interests, or their conduct to be such, in their official capacity, that he can no longer act with them harmoniously for the public good. But, before a Governor proceeds to this extremity, at least towards a Ministry having the confidence of the Assembly, he should be assured that he can replace them by others who will be acceptable to the country and to the Assembly, as well as to himself, and who will be prepared to assume full responsibility for his act in effecting the change of Government.

By a dissolution of the Assembly, consequent upon a change of Ministry, this question is brought directly under the review of the constituencies.

In the Letellier case, the Province of Quebec—which was the only part of the Dominion directly interested in the wisdom of the Lieutenant Governor's act in the dismissal of his Ministers—ratified the same by the support which they afforded to Mr. Joly, the Minister who became constitutionally responsible for the action of the Lieutenant Governor.

To revert for a moment to the votes of censure against Governor Letellier, which we have characterized as 'vague and ambiguous;' it is noticeable that these votes, whenever they were proposed, and whether they were negatived or affirmed, were invariably decided as strict party questions. This fact leads us to object still further to the proceedings in this case, and to deprecate any reliance upon it as a precedent for further guidance.

It may be said, however, that the unanimous defence of Mr. Letellier by his own political friends was in itself a presumption that he had been unduly influenced by party bias in his official conduct instead of uniformly exhibiting the neutrality which is essential to the position of a Constitutional Governor.

If this had been Mr. Letellier's offence, why was not the charge of partiality and political preferences distinctly formulated against him, and his sentence of dismissal based upon proof of the same? Such proof, if it existed, could not have been difficult to procure, and for the credit of the country, as well as in view of the importance of establishing a great constitutional precedent upon an adequate and unimpeachable foundation, it should have been adduced on this occasion, and the order in council for Mr. Letellier's removal predicated upon it."

The opinion of this learned constitutional writer, which has been necessarily abridged, may be summed up as follows :

1. The Dominion Cabinet, in the removal of a Lieutenant Governor, must constitutionally take the initiative and responsibility of the act.
2. Parliament acts unconstitutionally, by initiating such proceedings, and Cabinet Ministers cannot shield themselves behind a vote of Parliament.
3. The reasons given for M. Letellier's removal were vague and ambiguous, and not of a character to justify it.
4. The right of a Governor or Lieutenant Governor to dismiss his Ministers is unquestionable.
5. The duty of correcting the error of a Governor or Lieutenant Governor, in the change of his Ministers, devolves upon the Electorate.
6. The dismissal of Ministers can only be made on the responsibility of successors who must be sustained by the Electorate.
7. The successors of the dismissed Ministers having been sustained by the Electorate, the Lieutenant Governor could not be constitutionally removed inasmuch as his removal constituted an undue interference with the rights of Provincial autonomy.

The *Bystander*, Toronto, 1880, p. 264, comments on these views as follows :—

A careful and perfectly judicial review of the Letellier case brings

Mr. Todd to the conclusion, "that the action taken for the removal of Lieutenant Governor Letellier was at variance with constitutional law and precedent, as well as contrary to the spirit and intent of the British North America Act; inasmuch as it was initiated by Parliament, and not by the Executive Government, and did not set forth the particular acts of misconduct for which his removal was deemed to be necessary."

The Executive Government, according to the formal theory, is, no doubt, a body of servants of the Crown, appointed by Her Majesty or her representative, and perfectly separate from the Legislature: but, in fact, it is a committee of the party which has the majority in Parliament; and the distinction, which to Mr. Todd seems so essential, practically comes almost to nothing.

Party, under our present system, is the real force; it will practically decide all questions of Government, let the forms be what they may; Mr. Todd also, we venture to think, in this and other places, assumes that there are settled rules and precedents, when in fact there are none.

The Federal portion of our Constitution is new and peculiar; nothing in the British Constitution corresponds to it, nor can questions arising out of it be determined by British principles or precedents. According to Mr. Todd himself, the British authorities on this occasion went entirely wrong: it is possible that they may have been but half satisfied with their own decision; but they knew that the dominant party in the colony must have its way.

In the matter of the charges against the management of the Pacific Railway, Mr. Todd commends the knowledge of constitutional principles displayed by Lord Dufferin in following throughout the advice of his Ministers.

The *Bystander* of 1880 remarks, (p. 265:)

"That on all questions of policy the Crown should be so guided, is, as we know, the principle of Constitutional Government. But this was not a question of policy: it was a personal charge of corruption; in England it would have assumed the form of a motion of impeachment, and, supposing that motion to be carried, a trial before the House of Lords. To contend that it was right that the persons accused should be allowed—to advise the Crown as to the conduct of the investigation—to use the prerogative for the purpose of proroguing Parliament when it had entered on the case, and thus gaining time for the exertion of party interest in their own favor—to transfer the inquiry to another tribunal of their own appointment, and, when Parliament had re-assembled, to bring down despatches of the Governor General with a

view to influencing the decision ; seems to us, with all deference to Mr. Todd's authority, to be at variance with due common sense. That, after a party struggle carried on in the most injudicial manner and with the most objectionable weapons on both sides, the Ministry fell, is a fact which does not seem to us to alter the case.

The views of the Imperial Government as to the rights and duties of a Lieutenant Governor under this section were stated in a despatch to the Governor General of the 3rd July, 1879. The Colonial Secretary writes :

"There can be no doubt that he has an unquestionable constitutional right to dismiss his provincial ministers, if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should, of course, maintain the impartiality towards political parties which is essential to the proper performance of the duties of his office ; and, for any action he may take, he is, under the 59th section of the Act, directly responsible to the Governor General."

Taschereau J., in Lenoir & Ritchie, said :—

In the Federal Parliament the laws are enacted by the Queen, by and with the advice and consent of the Senate and the House of Commons—not so in the Provinces—their laws are enacted by the Lieutenant Governors and the Legislatures ; the Governor General is appointed under the Royal Sign Manual and Signet ; the Lieutenant Governors are not even named by the Governor General, but by the Governor General in Council. They are officers of the Dominion Government—they are not Her Majesty's Representatives.

60. The salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of CANADA.

Salaries of
Lieutenant-
Governors.

61. Every Lieutenant Governor shall, before assuming the duties of his office, make and subscribe before the Governor General, or some person authorized by him, Oaths of allegiance and Office similar to those taken by the Governor General.

Oaths, &c., of
Lieutenant-
Governor.

- See Sect. 11, 23 and 128.

62. The provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the time being of each Province, or other the chief Executive Officer or Administrator for the time being carrying on

Application of
provisions re-
ferring to
Lieutenant-
Governor.

the Government of the Province, by whatsoever title he is designated.

Appointment of
Executive
Officers for On-
tario and
Quebec.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant Governor from time to time thinks fit, and in the first instance of the following officers, namely,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with, in Quebec, the Speaker of the Legislative Council and the Solicitor General.

Executive Gov-
ernment of
Nova Scotia
and New Brun-
swick.

64. The Constitution of the Executive authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act.

See Sect. 92, s.s. 1.

Powers to be
exercised by
Lieutenant-
Governor of
Ontario or Que-
bec with advice
or alone.

65. All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the advice, or with the advice and consent of or in conjunction with the respective Executive Councils or any members thereof, or by the Lieutenant Governor individually, as the case requires subject nevertheless (except with respect to such as exist under Acts

of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

66. The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the advice of the Executive Council thereof.

Application of provisions referring to Lieutenant-Governor in council.

67. The Governor General in Council may from time to time appoint an Administrator to Execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

Administration in absence, &c., of Lieutenant-Governor.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Seats of Provincial Governments.

Legislative Power.

1.—ONTARIO.

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of one House, styled the Legislative Assembly of Ontario.

Legislature for Ontario.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two Electoral Districts set forth in the first schedule, to this Act.

Electoral Districts.

See Sect. 40, p. 86, for Schedule.

Sir John A. Macdonald in a report of 3rd November, 1869, gives the opinion that no power is conferred by Sec. 18 or other section of the B. N. A. Act, 1867, upon Provincial Legislatures to define or establish their privileges, and that no general powers of legislation for the good government of the Provinces are given to the Provincial Legislatures. Their powers are strictly limited to those conferred by Sections 92, 93, 94 and 95. Sessional Papers, 1877, No. 89, p. 202, 213.

2.—QUEBEC.

Legislature for
Quebec.

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Constitution of
Legislative
Council.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant Governor in the Queen's name, by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act.

The Legislative Council of Prince Edward Island has recently been saved from extinction by the casting vote of its President. This body in that Province is elective, making it substantially different from the Legislative Council of other Provinces that possess such institutions. There was a general election for the Council in the summer of 1879, turning largely upon the question of the continuance of the upper branch of the Legislature. Another election would likely be fatal to the Council, unless a very inferior Lower House might be thought by the people to require the other branch to sift its legislation. Indeed, a leading paper of the Province claims that the Legislative Council is the popular branch. Being elective, of course, the only motive the Islanders can have for its abolition is the cost of maintaining the Upper Chamber.

In *ex parte* Dansereau, petitioner for a writ of *Habeas corpus*, held by the Q. B., appeal side, Montreal, (19 L. C. J. 210):

1. That the Legislative Assembly of the Province of Quebec has power to compel the attendance of witnesses before it, and may order a witness to be taken into custody by the sergeant-at-arms if he refuses to attend when summoned.

2. The omission to state in the Speaker's warrant of arrest the grounds and reasons therefor is not a fatal defect.

3. The Quebec Statute, 33 Vic., c. 5, viz.: An Act to uphold the authority and dignity of the Houses of the Quebec Legislature and the independence of the members thereof, and to protect persons publishing Parliamentary papers, is within the powers of the Local Legislature. The 2nd sect. of that Act enacts that each House may command and compel the attendance or production before such House or

before any committee thereof of such persons, papers and things as it may deem necessary for any of its proceedings or deliberations.

73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec. Qualification of Legislative Councillors.

See Sect. 23.

74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant. Resignation, Disqualification &c.

75. When a Vacancy happens in the Legislative Council of Quebec, by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy. Vacancies.

76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council. Questions as to Vacancies, &c.

77. The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead. Speaker of the Legislative Council.

78. Until the Legislature of Quebec otherwise provides, the presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers. Quorum of Legislative Council.

79. Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative. Voting in Legislative Council.

80. The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful Constitution of Legislative Assembly of Quebec.

to present to the Lieutenant Governor of Quebec for assent, any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

THE SECOND SCHEDULE.

Electoral Districts of Quebec specially fixed.

COUNTIES OF

Pontiac.	Shefford.
Ottawa.	Stanstead.
Argenteuil.	Compton.
Huntingdon.	Wolfe and Richmond.
Missisquoi.	Megantic.
Brome.	
Town of Sherbrooke.	

3.—ONTARIO AND QUEBEC.

First Session of
Legislatures.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

Summoning of
Legislative As-
semblies.

82. The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

In *Lenoir v. Ritchie*, 15 Can. L. J. N. S. 315, Gwynne, J., said:

The use of Her Majesty's name by the Provincial Legislature, is, by the Act, confined to the summoning and calling together the Legislatures, and singularly, as it seems, this is by Sec. 82, rather by accident I apprehend, than design, confined to the Lieutenant Governors of Ontario and Quebec.

Restriction on
election of
holders of office.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance,

Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are Continuance of existing Election laws. in force in those Provinces respectively, relative to the following matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members, and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that, until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the district of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

In *Lacroix v. Delisle* (2 R. C. 233), held on demurrer :

That Section 84, which refers to the election laws of the former

Province of Canada, not having made mention of the penalties imposed by C. S. C., ch. 6, against public officers voting at Parliamentary elections, these penalties no longer exist according to the maxim *expressio unius exclusio est alterius*; and that in any case these penalties would not apply to officers of customs, voting at Provincial elections, as they were appointed by the Federal Government exclusively.

The case was afterwards brought before the Court of Review, in Montreal, and this judgment was reversed. There were, however, no further proceedings, the case having been settled.

Another case, *Barthe v. Chevalier*, was shortly after submitted to the Superior Court, in the District of Richelieu. The defendant, a Registrar of Deeds, appointed by the Provincial Government of Quebec, was prosecuted for having voted at an election of a member for the Commons of Canada. Mr. Justice Loranger, following the decision of the Court of Review, condemned the defendant to pay a penalty of \$2,000.

The case was brought before the Queen's Bench, sitting at Montreal; but before it came up for hearing a third case of a similar nature had originated in the District of Gaspé, *Hamilton vs. Bevruchène*, and was decided by the Appellate Court of Queen's Bench, sitting in Quebec. Beauchène, being a tide-waiter and searcher in Her Majesty's Customs, voted at an election of a member for the Legislative Assembly of the Province of Quebec. He was sued for the penalty of \$2,000 imposed by sections 1 and 2 of ch. 6, C. S. C. The action was dismissed on demurrer, on the ground that the defendant being an officer of the Dominion Government, he was not disqualified from voting at the election of a local member.

In appeal, this judgment was confirmed, on the 8th March, 1875, the Court holding that there was no penalty imposed by the B. N. A. Act (sect. 84 and 130). In delivering the judgment, C. J. Sir A. A. Dorion cited:—

Savage vs. Deacon and Smythe & Deacon, (22 U. C., C. P., p. 441.)

The judgment was confirmed without altering the reasons contained in it.

In *Savage v. Deacon* (22 U. C., C. P., p. 441), Held:—

That a city postmaster in the Province of Ontario was not liable to a penalty for voting at an election for a member of the Dominion House of Commons.

Galt, J., in delivering the Judgment of the Court, said, as the law stood at the time of the passing of the B. N. A. Act 1867, any postmaster of any city in Upper Canada divided into wards, was prohibited from voting under a penalty of two thousand dollars. By the Federal Post Office Act, 31 Vict. c. 10, all laws in force respecting the Postal Service at the date of Confederation except as to past matters were declared to be repealed. This repeal put an end to the disqualifications of

postmasters under the former Act. As to the provision in the Dominion Act of 1871 declaring generally that the laws in force in the different Provinces at the Union relative to . . . elections shall continue to apply to elections (with certain exceptions), such a provision could not by itself revive a highly penal clause in a repealed Statute.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer. Duration of Legislative Assemblies.

86. There shall be a session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session. Yearly Session of Legislature.

87. The following provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say, —the Provisions relating to the Election of a Speaker originally and on vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of Voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly. Speaker, quorum, &c.

4.—NOVA SCOTIA AND NEW BRUNSWICK.

88. The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected. Constitutions of Legislatures of Nova Scotia and New Brunswick.

5.—ONTARIO, QUEBEC, AND NOVA SCOTIA.

89. Each of the Lieutenant Governors of Ontario, Quebec, and Nova Scotia shall cause Writs to be issued for the First First Elections.

Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

6.—THE FOUR PROVINCES.

Application to
Legislatures of
Provisions res-
pecting money
votes, &c.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,— the provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

See Sects. 53, 54, 55, 56 & 57.

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative au-
thority of Par-
liament of
Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of CANADA, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of CANADA extends to all Matters coming

within the Classes of Subjects next herein-after enumerated;
that is to say,—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of CANADA.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine, and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. *Indians* and Lands reserved for the *Indians*.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The difficulties which, after an experience of a few years, have shown a work of this kind to be useful, if not necessary in some shape, were foreshadowed by Lord Carnarvon in the following terms, when the B. N. A. Act came before the House of Lords :

“I now pass to that which is, perhaps, the most delicate and the most important part of this measure—the distribution of powers between the Central Parliament and the local authorities. In this is, I think, comprised the main theory and Constitution of Federal Government ; on this depends the practical working of the new system ;—and here we navigate a sea of difficulties—there are rocks on the right hand and on the left. If, on the one hand, the Central Government be too strong, then there is risk that it may absorb the local action and that wholesome self-government by the provincial bodies, which is a matter of both good faith and practical expediency to maintain ; if, on the other hand, the Central Government is not strong enough, then arises a conflict of State rights and pretensions, cohesion is destroyed, and the effective vigour of the central authorities is encroached upon. The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the Provinces ; and, at the same time, to retain for each Province so ample a measure of municipal liberty and self-government as will allow, and indeed compel them, to exercise those local powers which they can exercise with great advantage to the community. . . . In this Bill the division of powers has been mainly effected by a distinct classification. That classification is four-fold : 1st, those subjects of legisla-

tion which are attributed to the Central Parliament exclusively ; 2nd, those which belong to the Provincial Legislatures exclusively ; 3rd, those which are subjects of concurrent legislation ; and 4th, a particular question which is dealt with exceptionally. To the Central Parliament belong all questions of the public debt or property, all regulations with regard to trade or commerce, customs and excise, loans, the raising of revenue by any mode or system of taxation, all provisions as to currency, coinage, banking, postal arrangements, the regulation of the census, and the issue and collection of statistics. To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities ; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its Criminal Code, and where an offense may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one ; and I trust that before long the criminal law of the four Provinces may be assimilated—and assimilated, I will add, upon the basis of English procedure. Lastly, the fisheries, the navigation and shipping, the quarantine regulations, the lighting of the coast, and the general question of naval and military defence, will be placed under the exclusive control of the Central Government.

“The principal subjects reserved to the Local Legislatures are the sale and management of the public lands, the control of their hospitals, asylums, charitable and municipal institutions, and the raising of money by means of direct taxation. The several Provinces, which are now free to raise a revenue as they may think fit, surrender to the Central Parliament all powers under this head, except that of direct taxation. Lastly, and in conformity with all recent colonial legislation, the Provincial Legislatures are empowered to amend their own constitutions. But there is, as I have said, a concurrent power of legislation to be exercised by the Central and the Local Parliaments. It extends over three separate subjects—immigration, agriculture, public works. Of these the two first will in most cases probably be treated by the provincial authorities. They are subjects which, in their ordinary character, are local ; but it is possible that they may have, under the changing circumstances of a young country, a more general bearing, and therefore a discretionary power of interference is wisely reserved to the Central Parliament. Public works fall into two classes : first, those which are purely local, such as roads and bridges, and municipal buildings—

and these belong, not only as a matter of right, but also as a matter of duty, to the local authorities. Secondly, there are public works which, though possibly situated in a single Province, such as telegraphs and canals, and railways, are yet of common import and value to the entire Confederation, and over these it is clearly right that the Central Government should exercise a controlling authority.

“In closing my observations upon the distribution of powers, I ought to point out that just as the authority of the Central Parliament will prevail whenever it may come into conflict with the Local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the central body. It will be seen, under the 91st clause, that the classification is not intended ‘to restrict the generality’ of the powers previously given to the Central Parliament, and that those powers extend to all laws made ‘for the peace, order, and good government’ of the Confederation, terms which, according to all precedents, will, I understand, carry with them an ample measure of legislative authority. I will add that, whilst all general Acts will follow the usual conditions of Colonial legislation, and will be confirmed, disallowed, or reserved for Her Majesty’s pleasure by the Governor General, the Acts passed by the Local Legislature will be transmitted only to the Governor General, and be subject to disallowance by him within the space of twelve months.”

As to the unalterable character of the Bill, Lord Carnarvon repeatedly expressed himself:—

“Such an undertaking was part of the compact between the several Provinces, and it was an indispensable condition on the part of New Brunswick.”

In answer to Lord Lyveden, the noble Lord said: “It was, of course, within the competence of Parliament to alter the provisions of the Bill; but he should be glad for the House to understand that the Bill partook somewhat of the nature of a treaty of union, every single clause of which had been debated over and over again, and had been submitted to the closest scrutiny, and, in fact, each of them represented a compromise between the different interests involved. Nothing could be more fatal to the Bill than that any of those clauses which were the result of a compromise should be subject to much alteration. . . . It would be his duty to resist the alteration of anything which was in the nature of a compromise, and which, if carried, would be fatal to the measure.”

This was in accordance with the Colonial compact as expressed by Sir John A. Macdonald in the Legislative Assembly of Canada :

“ As I stated in the preliminary discussion, we must consider this scheme in the light of a treaty. . . . We made the arrangement, agreed upon the scheme, and the deputations from the several Governments represented at the Conference went back pledged to lay it before their Governments, and to ask the Legislature and people of their respective Provinces to assent to it.” Debates on Confederation, p. 31.

The distribution of powers between the Federal Parliament and the Local Legislatures is necessarily undefined in its details, and is rather complicated ; but this is to be found more or less in all such instruments.

Art. 1, Sec. 8 of the original American Constitution enumerated the functions which should be performed by the Congress of the United States, and no attempt had been made to define the powers of the individual States. But in 1789 twelve amendments were made, the last of which laid down the principle that “ The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The Constitution of the Swiss Confederation of May 29, 1874, regulates some of the powers as follows :

Art. 2. The *Cantons* are sovereign in so far as their sovereignty is not limited by the Federal Constitution, and, as Sovereign States, they exercise all the rights which are not delegated to the Federal power.

The following articles contain the powers of the Federal authorities :

Art. 3. The Confederation has for its object to guarantee the independence of the country against Foreigners, to maintain peace and order at home, to protect the liberty and the rights of the confederated parties, and to increase their common prosperity.

Art. 8. The Confederation alone has the right to make war and peace, and Treaties and Alliances with Foreign States, especially Customs and Trade Treaties.

Art. 24 gives to the Federal power the right to regulate the damming of rivers and cutting of timber in high regions.

Art. 25. The Confederation regulates the right of fishing and hunting, for the purpose of preserving the fish and large game in the mountains, and of protecting birds useful to agriculture and sylviculture.

Art. 26. Legislation and working of Railways belong to the Federal power.

Art. 27. The Federal authority have the right to create Federal Universities and other establishments for superior education, and to give subsidies to establishments of that class.

The *Cantons* are to provide for the primary instruction of children, which should be adequate, and placed exclusively under the direction of the Civil authority.

Primary instruction is obligatory, and in the Public Schools gratuitous.

The Public Schools to be so managed that the adherents of every creed should be able to attend them without having their liberty of conscience or of belief in any way interfered with.

The Confederation will take such measures as may be necessary against the Cantons that will not comply with these obligations.

Arts. 28, 29 and 30.—The imposition and collection of duties on imports and exports belong to the Confederation.

Art. 33.—The Cantons can exact proof of capacity of those who desire to exercise any of the liberal professions, for whom provision is to be made by Federal legislation to enable them to obtain diplomas of capacity, valid throughout the whole Confederation.

In *Re Niagara Election Case* (29 U. C., C. P. 275), Gwynne, J., distinguishes between the distribution of powers in the Constitution of the United States and Dominion Governments as follows:—

The powers of the General Government are made up of concessions of the several States,—whatever is not expressly given to the former the latter expressly reserve. With us the very opposite of this is the case. The Dominion Government and the several Provincial Governments emanate from the one Sovereign Power, the Imperial Parliament. The Provincial Legislatures have no jurisdiction whatever but what is expressly conferred upon them by the Statute which calls them into existence, whereas by that same Statute, upon the Dominion Parliament is conferred the power of making laws not merely in respect of the particular subjects enumerated, but in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces.

1.—The Public Debt and Property.

It is provided by Sect. 108, that the Public Works and Property of each Province, enumerated in the following Schedule, shall be the property of Canada.

See also Sects. 102 and 107.

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of CANADA.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of CANADA appropriate for the Use of the Provincial Legislatures and Governments.

9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

In *Robertson v. The Queen*, now pending in the Exchequer Court of Canada, it is contended on the part of the Suppliant:

That the word "Rivers" in clause 5 of Schedule 3 is a typographical error for "River," from the fact that in the original draft Constitution adopted at the Quebec Conference (Canadian Pamphlets, 137, in Parliamentary Library, Ottawa) the words used were "River and Lake Improvements," meaning *River Improvements* and *Lake Improvements*, as the words in Sect. 91, s.s. 12, "Sea Coast and Inland Fisheries," mean *Sea Coast Fisheries* and *Inland Fisheries*. See Sect. 108.

2.—The Regulation of Trade and Commerce.

In *Regina v. The Justices of Kings Co.* (2 Pugsley, 535).

Held, by the Supreme Court of New Brunswick :—That a Local Legislature has no power under the B. N. A. Act of 1867 to pass a law directly or indirectly prohibiting the manufacture or sale of spirituous liquors,—that such law is in direct conflict with the powers of the Dominion Parliament as well over trade and commerce as with their right to raise a revenue by duties of Impost and Excise.

Ritchie, C. J., in delivering the Judgment of the Court said: To the Dominion Parliament of Canada is given the power to legislate exclusively on "the regulation of trade and commerce." The regulation of trade and commerce must involve full power over the matter to be regulated, and must necessarily exclude the interference of all other bodies that would attempt to intermeddle with the same thing. The power thus given to the Dominion is general, without limitation or restriction, and therefore must include traffic in articles of merchandise, not only in connection with foreign countries, but also that which is internal between different Provinces of the Dominion, as well as that which is carried on within the limits of an individual Province. As a matter of trade and commerce, the right to sell, is inseparably connected with the law permitting importation.

. . . How can the Local Legislature prohibit (by arbitrarily refusing to grant any license) the sale of spirituous liquors of all kinds, without coming in direct conflict with the Dominion Legislature on the subject of Inland Revenue, involving the right of manufacturing and distilling spirits, &c., as regulated by 31 Vic. chap. 8, and the subsequent Acts in amendment thereof,—and the excise duties leviable thereby, and the licenses authorized to be granted thereunder.

The Corporation of St. Roch v. David Dion (1 Q.L.R., p. 241). This was an action for a penalty incurred for violation of the following by-law of a municipality:—"Every person not an inhabitant of this municipality and who by himself or by other persons may come hither to carry on the trade of delivering, offering for sale or selling bread, wholesale or retail, shall take out a license from the Council of this Municipality, for which license or leave every such person shall pay the sum of \$12."

Stuart, J., held, that the by-law was in restraint of trade to the oppression of the subject, and absolutely void, and that consequently the action for the penalty under it must be dismissed.

In *Morin v. The Corporation of the Village of St. Gabriel*; HELD, by the Circuit Court, Torrance, J., Montreal, 30th April, 1880.

That a municipal by-law, in the words following, was void as being in restraint of trade, viz.: "The traders in general, whatever be the extent and kind of their commerce, who do not reside within the Municipality of the Village of St. Gabriel, and who have not therein a place of business, shall not be allowed to exercise therein their trade or commerce, without having previously obtained from the Secretary-Treasurer a license for that object." The plaintiff claimed \$20 damages, because the defendants had, by a policeman, coerced him by threats of imprisonment, into paying them \$10 for the privilege of plying his trade of pedlar. The evidence showed that plaintiff held a license from the Quebec Government, authorizing him under sect. 54 of the License Act, 1878, to ply his calling as pedlar, also that the police of St. Gabriel had arrested him on the order of the Council, and that on the 8th August he was fined costs of court, and again on the 25th August he was arrested, when he paid \$10 for a license. I think the case of *St. Roch v. Dion* is exactly in point as to the invalidity of the by-law. The by-law should have exactly followed the authority of the Mun. C. 582. Instead of doing so, the by-law strikes at non-residents, which may be regarded as in restraint of trade. As to the sale of provisions or victuals not being protected by the provincial license, the by-law is clearly not intended for that particular case; and to operate against it, should have been otherwise framed. I think, therefore, that the plaintiff is entitled to judgment. There is another case, being an appeal from the judgment of the Justices condemning him to pay the tax of \$10, and praying that the judgment be annulled and the by-law be declared to be *ultra vires*. This case is also decided in favor of the appellant, *Morin*.

Hart et la Corporation du Comté de Missisquoi (Cour de Circuit) Caron, J., (2 Q.L.R., 170). Jugé :—

Que les pouvoirs accordés aux Conseils de Comtés par l'Acte de Tempérance de 1864, ne peuvent être ni modifiés ni abrogés par la Législature de la Province de Québec, puisque ces pouvoirs concernent l'industrie et le commerce, et les règlements concernant l'industrie et le commerce et la formation du revenu par le système de taxes, sont sous le contrôle exclusif du Parlement du Canada.

Rien ne justifie l'autorité qu'une Législature Provinciale s'arrogerait en légiférant sur le commerce intérieur. Les Législatures locales peuvent à la vérité faire des lois relatives à l'octroi des licences pour magasins, tavernes, etc., mais seulement *dans le but de se former un revenu* pour faire face aux dépenses de la Province.

City of Fredericton v. The Queen (3 Can. S. C., 506). Held, by the Supreme Court of Canada :

1. That the Dominion Act (41 Vict., c. 16) cited as "The Canada Temperance Act, 1878," which makes provision by conditional legislation for the prohibition of the traffic in intoxicating liquors (in certain localities throughout the Dominion where a majority of the electors decide that the Act shall go into effect) is "a Regulation of Trade and Commerce," and within the powers conferred upon the Dominion Parliament by Sub-Sec. 2 of Sec. 91 of the B. N. A. Act, 1867.

2. That the power to regulate, carries with it the power to prohibit.

3. That the right to regulate trade and commerce conferred upon the Dominion Parliament cannot be overridden by any local legislation in reference to any subject over which power is given to the Provincial Legislatures.

4. That (affirming the ruling in *Regina v. The Justices of Kings Co.*, 2 Pugs., 535) a Provincial Legislature has no power to pass a law prohibiting the manufacture or sale of spirituous liquors ; that such law would be in direct conflict with the powers of the Dominion Parliament over trade and commerce.

5. That the power of a Provincial Legislature to authorize or prohibit a trade or business is repugnant to the power of regulation exclusively given to the Dominion Parliament over the same subject.

Ritchie, C. J., in delivering judgment, said :—(adopting the reasoning in the United States License Tax Cases, 5 Wall. 462) that the constitutional power of the Dominion Parliament to regulate trade and commerce can be exercised by means of licenses, and that would give authority to the licensee to do whatever business its terms authorized, but that the power conferred upon the Provincial Legislatures to raise

a revenue by granting licenses could reach only existing subjects of taxation, and could not authorize a trade or business within a Province in order to tax it. And that he could not appreciate the force of the objection taken to the constitutionality of the Canada Temperance Act, on the ground that the right to prohibit the sale of intoxicating liquors as a beverage interfered with the right of the local legislatures to raise a revenue by means of shop and tavern licenses. If the Dominion Parliament, in the exercise of its right to regulate trade and commerce, adopt such regulations as in their practical operation conflict or interfere with the beneficial operation of local legislation, then the law of the Local Legislature must yield to the Dominion law, because any matter coming within any of the classes of subjects enumerated in the 91st section of the British North America Act as confided to Parliament, is not to be deemed to come within the class of matters of a local nature assigned exclusively to the Local Legislatures. In other words, the right to regulate trade and commerce is not to be overridden by any local legislation, in reference to any subject over which power is given to the Federal Legislature.

Justices Fournier, Taschereau and Gwynne concurred with the Chief Justice. Henry, J., dissenting, was of the opinion :—

That Sub-sec. 2 of Sec. 91, giving power to the Dominion Parliament to regulate trade and commerce, does not override the specific grant of powers in the matter of Licenses, conferred by Sect. 92, Sub-sec. 9, upon the Provincial Legislatures; that the subject of licenses for the retail of spirituous liquors in shops, saloons, and taverns is wholly one in the nature of a police regulation, and that it was not intended either by the compact of Union, or the Act passed therefor, that the local power should be affected, restrained or controlled by any Dominion legislation.

In *Denton v. Daley* at the February term (1880) of the County Court Digby, Nova Scotia —Savary, County Judge, held :—

That, under the power to regulate trade and commerce, the power to regulate the retail sale of spirituous drinks was conferred upon the Dominion Parliament.

That, in the absence of a Dominion Statute controlling and regulating trade, it was quite competent for the Local Legislature to ordain local and municipal regulations respecting the retail sale of spirituous drinks, but such legislation must give way when the Dominion Parliament intervenes in its paramount authority on any subject specially conferred upon it by the B. N. A. Act.

That, the power to regulate the procedure and practice of the Courts, under Sub-sec. 14 of Sec. 92, depends upon the power to legislate on the subject in respect to which they are invoked,—as laid down in the judgment of the Supreme Court of Canada in *Valin v. Langlois*.

In *Severn v. The Queen* (2 Can. S. C. 77), held :—

That, the Legislature of the Province of Ontario has no authority to raise a revenue from brewers by requiring them to take out licenses to carry on their business and dispose of their beer within the Province. (Overruling *Regina v. Taylor*, 36 U. C., Q.B., p. 201.) The Chief Justice Richards said :

That, under the B. N. A. Act of 1867, the power to regulate Trade and Commerce rests exclusively with the Dominion Parliament, as also the right to raise money by the mode of *indirect* taxation, except so far as the same may be expressly given to the Provincial Legislatures.

That, making it necessary to take out and pay for a license to sell, by wholesale or retail, spirituous, fermented or other manufactured liquors, is raising money by the *indirect* mode of taxation.

That, all the authority given to the Provincial Legislatures to exercise the power of raising money by the *indirect* mode of taxation is contained in Sec. 92 of the B. N. A. Act, which gives power to legislate on the subject of :

§ 8. Municipal institutions in the Province ;

§ 9. Shop, saloon, tavern, auctioneer, *and other licenses* in order to the raising of a revenue, for provincial, local or municipal purposes.

That it was not intended by the words “ other licenses ” to enlarge the powers referred to, beyond shop, saloon, and tavern licenses, in the direction of licenses to affect the general purposes of trade and commerce and the levying of indirect taxes, but rather to limit them to the licenses which might be required for objects which were purely municipal or local in their character. . . . I consider the power, now claimed, to interfere with the paramount authority of the Dominion Parliament in matters of trade and commerce and indirect taxation ; and so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the B. N. A. Act, that I cannot come to the conclusion that it is conferred by the language cited as giving that power. By the interpretation I give to the words “ and other licenses,” limiting them to the other licenses which are of a local and municipal character, and giving full force to the words, *shop, saloon, tavern* and *auctioneer* license, I think I carry out the intention of the B. N. A. Act and make all the powers harmonize.

Ritchie, J., (*dissenting*) said :—

What licenses did the Legislature intend to cover by the words, "and other licenses"? Had the licenses specified in this section been *ejusdem generis*; had they been confined to those which, throughout the Dominion, previously to Confederation, had been granted only by municipal authorities; and had the revenue authorized to be raised been for municipal purposes alone, I should have thought there was much force in the contention that the words "and other licenses" should be read in a restricted sense. . . . As the case stands, I can see no reason why the golden rule, as it has been often called, by which Judges are to be guided in the construction of Acts of Parliament, should be departed from, viz.: to read the words of an Act of Parliament in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, there being nothing to be discovered on the face of the Statute to show that they were not intended to bear that construction, nor anything in the Act inconsistent with the declared intention of the Legislature.

The licenses named are not *ejusdem generis*, for certainly auctioneer licenses are not *ejusdem generis* with tavern licenses, nor always granted by the same authority. . . . Therefore, I think the rule *nos citur a sociis* cannot apply in this case.

It is said this construction conflicts with the power of the Dominion Government, "to regulate Trade and Commerce," and the raising of money by any mode or system of taxation; all I can say in answer to that, is, that so far, and so far only as the raising of a revenue for provincial, municipal and local purposes is concerned, the B. N. A. Act in my opinion gives to the Local Legislatures, not an inconsistent, but a concurrent power of taxation, and I fail to see any necessary conflict.

Strong, J., (*dissenting*) said:

In *The Queen v. Taylor* (36 U. C., Q. B. 218), the Court of Appeal of Ontario, adjudicating upon the question now before this Court, determined that the words "other licenses," as used in this section, gave power to impose licenses upon persons carrying on the trade of brewers.

This conclusion was reached by the consideration that all powers conferred in section 92 were to be read and regarded as exceptions to those enumerated in section 91, and by that section (sec. 91) given to the Dominion Parliament.

That section 92 was, therefore, to be construed as if it had been contained in an Act of the Imperial Parliament, separate and apart from section 91, and was, therefore, to be read independently of that section. The rule applied in the construction of Statutes, which restrains general words following specific words to subjects *ejusdem generis* with

those specially mentioned, was thought not to be applicable, inasmuch as the specific words were not *ejusdem generis* with each other, and it was, therefore, impossible to say with which class of the specific classes mentioned, the general words should be associated ; in short, it was held to be impossible to apply to this clause the well-known maxim of interpretation, *noscitur a sociis*. The words "other licenses" were, therefore, held to be susceptible of only one construction, that which attributed to them the same meaning as if the expression in the Act had been "any licenses," or "all licenses," standing alone, unconnected with any specific words.

I was a party to the judgment in *The Queen v. Taylor*, and a careful consideration since, has not only not led me to discover any error in it, but has brought to my notice authorities not quoted to the Court of Appeal, as well as some additional reasons for adhering to the decision.

Fournier, J., said :

1st. The law in question is void because it comes in conflict with the power of the Federal Parliament to regulate trade and commerce under sub-sec. 2 of sec. 91.

2nd. Because the terms "and other licenses" must be read as if they were followed by these words, "*not incompatible with the power of regulating trade and commerce.*"

3rd. Because the tax imposed by this Act is an indirect tax which the Local Government has no right to impose.

4th. Because it comes in direct conflict with the 31st Vic. chap. 8, relating to excise.

Henry, J., said :

The legislative power given to the Dominion Parliament is unlimited :

"To make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces," and we need not necessarily consider the provisions of sub-sections 2 and 3 of section 91.

Everything in the shape of legislation for the peace, order and good government of Canada is embraced, except as before mentioned.

But sub-section twenty-nine goes further, and provides for exceptions and reservations in regard to matters otherwise included in the power of legislation given to the Local Legislatures, and also provides that :

"Any matter coming within any of the classes of subjects enumerated in this

section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

"The regulation of trade and commerce" and "the raising of money by any mode or system of taxation," is, however, specially mentioned, and both include the right to make and have carried out all the provisions in the Dominion Act. . . . The subjects in all their details, of which trade and commerce are composed, and the regulation of them and raising of revenue by indirect taxation, must, therefore, be matters referred to and included in the latter clause of sub-section before mentioned, and if so, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Every constituent, therefore, of trade and commerce, and the subject of indirect taxation, is thus, as I submit, withdrawn from the consideration of the Local Legislatures, even if it should otherwise be *apparently* included. The Imperial Act fences in those twenty-eight subjects wholesale and in detail, and the Local Legislatures were intended to be, and are kept out of the inclosure, and when authorized to deal with the subject of "direct taxation within the Province," in sub-sect. 2 of Sect. 92, and "shop, saloon, tavern, auctioneer and other licenses," in ss. 9, they are commanded, by the concluding clause of sub-section 29, section 91, not to interfere by measures for what they may call "direct taxation," or in regard at least to "other licenses," or in reference to "municipal institutions," with the prerogatives of the Dominion Parliament as to the "regulation of trade and commerce," including "Customs and Excise laws," and "the raising of money by any mode or system of taxation."

But we are asked to hold that, under sub-section 9, "shop, saloon, tavern, auctioneer and other *licenses*" will include licenses to brewers, in the position occupied by the appellant, to sell by wholesale. Such an application can only be made by virtue of the concluding words: "and other licenses."

The extent and limit to be given to those words have not been stated or referred to; but some must exist to their application. If applicable to *brewers'* and *distillers'* licenses, which, at the date of the Imperial Act, were completely out of reach of any municipal control, why not extend them to other traders? If uncontrolled, a Local Legislature might organize a *system of licenses*, and indirectly, not only tax,

but regulate and restrict certain industries, trades and callings, or might indeed, virtually prohibit and destroy them. We must reasonably conclude the Legislature meant to restrict the power at some point, and we must determine where that restriction should be imposed, not only from the words of the sub-section in question, but from the tenor and bearing of the whole Act, the state of the law at the time, the peculiar position of the United Provinces and the object of their union, with the means for working out the Constitution provided.

Taking the words themselves, what is the law as to the construction of them? From a review of all the cases cited, and others, I am forced to conclude that the words "and other licenses" must be restricted. We find them preceded by the words, "shop, saloon, tavern, auctioneer," and I cannot decide that brewers or distillers are *ejusdem generis* with them or any of them. That they should be, to include the right of legislation claimed, taking the whole of the *Imperial Act* together, is a position too clearly established to be doubted.

Where it is admitted that some restraint must be put upon the construction of the word, *the rule attaches, that a general words following specific ones must be taken to mean something of the same kind.* (Citing Reed and Ingham, 3 E. and B. 88.)

A similar construction was put upon general words in '*Sandeman v. Breach* (7 B. & C. 100).

29 Car. 2, chap. 7, provided that: No tradesman, artificer, workman, laborer, or other person or persons should work at their ordinary calling upon the Lord's day.

Per Lord Tenterden: "It was contended that under the words 'other person or persons' the drivers of stage coaches are included. But where general words follow particular ones, the rule is, to construe them as applicable to persons *ejusdem generis*.

We think the words 'other person or persons' cannot have been used in a sense large enough to include the owner and driver of a stage coach."

I feel bound, therefore, on principle, and as the result of all the cases, to construe the words in question as controlled by the other portions of the Act, and, therefore, not to include power to the Legislature of *Ontario* to legislate for licenses to brewers or distillers to sell by wholesale.

Taschereau, J., said:

The only question submitted for our decision is, whether the Legislature of *Ontario* had the power to pass the Statute, 37 *Victoria*, chap. 32, under which the Appellant was condemned, requiring brewers to

take out a license for selling fermented or malt liquors by wholesale.
 . . . After long and mature deliberation I have come to the conclusion that the sections of that Act applicable to the defendant are *ultra vires*.

It is evident that in adjudicating on the extent of sub-section 9 of section 92, we must read it in connection with the remainder of the Act itself, and more particularly with sub-sections 2 and 29 of section 91, which indicate the powers of the Parliament of Canada.

Under sub-section 2 of section 91 the Parliament of Canada has the exclusive regulation of trade and commerce, and under sub-section 29 of section 91 it is declared that:

Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

From section 122 of the B. N. A. Act we can safely infer that the Parliament of Canada has *exclusive* jurisdiction as to excise. Now, can the Crown justify the Act in question in this cause under sub-section 9 of section 92 of the B. N. A. Act, which grants to Provincial Legislatures in the Dominion of Canada the right of making laws about shop, saloon, tavern, auctioneer *and other licenses*? I think not; this power would evidently clash with the Dominion power of regulating trade and commerce and of imposing duties thereon, and exacting licenses. If this right existed, both Parliament and Provincial Legislatures would possess an equal right to impose a duty and exact licenses.

See cases under Sect. 92, s.s. 9, for other illustrations of the construction of the words "and other licenses."

Trade Marks.

The Supreme Court of the United States in November, 1879, as appears by the following decisions, has declared unconstitutional the laws enacted by Congress for the protection of Trademarks, by Registration as not included in the power given to Congress to Regulate Commerce, or to Legislate in reference to Inventions and Copyright (the power to regulate *trade* not having been conferred upon Congress).

And the proprietor of a Trade Mark in the United States can now have recourse only to the protection of the Common Law and the Local Statutes in each of the States.

United States v. Steffens; *same v. Witteman*; *same v. Johnson* (2 L. N. 416).

The defendants being indicted for violations of the Statute of the United States for the protection of Trade Marks, it was held by the U. S. Supreme Court:

1. That property in Trade Marks has long been recognised and protected by the Common Law and by the Statute of the States, and does not owe its existence to the Act of Congress providing for their Registration.

2. That a Trade Mark is neither an invention nor a discovery, nor a literary product, within the meaning of the clause of the Constitution in regard to securing to inventors the exclusive use of their writings and discoveries; as it does not involve the element of originality nor depend upon novelty, but is simply founded on priority of appropriation.

3. That as a Regulation of Commerce, if Trade Marks can in any case be the subject of Congressional action, that action is limited by the Constitution to their use in commerce with foreign nations, among the several States, and with the Indian tribes.

As the Statute is so framed that it is impossible to separate that which has reference to commerce within its control and that which has not, the whole legislation must fall, as being void for want of constitutional authority.

M. Renault, professeur agrégé à la Faculté de Droit, dans un discours devant la Société de Législation comparée, prononcé à la séance du 14 janvier 1880, a fait les observations suivantes sur la question des Marques de Fabrique aux Etats-Unis.

Je crois pouvoir rendre compte du raisonnement par suite duquel la Cour Suprême des Etats-Unis a déclaré inconstitutionnelle la législation fédérale sur les marques.

Il s'agit de savoir si cette législation rentre dans la disposition suivante de la constitution: "Le Congrès aura le pouvoir de réglementer le commerce avec les nations étrangères, entre les divers Etats de l'Union, et, en outre, avec les tribus indiennes." (Art. 1, parag. 3, al. 3.)

La Cour admet,—bien qu'on ait soulevé des difficultés sur ce point, que les marques sont assez étroitement liées au commerce auquel elles sont destinées pour qu'elles doivent, par cela même, être soumises au contrôle du Congrès, quand elles sont appliquées aux marchandises appartenant à la nature du commerce que le Congrès a été autorisé à réglementer.....Le Congrès pouvait donc prendre des dispositions sur les marques, mais seulement dans la mesure où il pouvait en prendre sur le commerce.

Si donc la législation sur les marques s'appliquait uniquement dans les rapports des Américains avec les étrangers, ou des Américains d'un Etat avec les Américains d'un autre Etat, elle rentrerait dans les attributions du Congrès. Mais cette législation est plus générale, elle est

destinée à s'appliquer dans les limites des Etats et dans les rapports des citoyens d'un même Etat ; en cela, elle est inconstitutionnelle et elle empiète sur les attributions réservées aux législatures des Etats.

The Dominion Parliament considered the regulation of Trade Marks as falling within the scope of its powers.

The principles of law designed to protect an inventor or manufacturer in the enjoyment of the advantages derivable from his labor, skill or ingenuity, and the reputation he has earned thereby, were recognized by the Courts of Law of England and France many years before these principles were embodied or carried out, by special legislation, into statute laws. With the development of trade and commerce, a public opinion had been formed which declared it an immoral act for any one to use the results of another's labor, skill or reputation without giving a remuneration therefor. The public sentiment and the common law, as a consequence, gave expression to statutory provisions for the protection of Trade Marks ; and thus the rule of law as to Trade Marks does not arise from, nor depend upon, Statute laws ; and the Courts of Law in England, and France, and in the United States, will act for the protection of Trade Marks solely on the principle of affording protection to property.

The first cases that came before the Courts of England arose upon actions for damages sustained by fraud and deceit, and a case of this kind occurred in England as early as the year 1680, reported in 1 *Popham* 43 (22 Elizabeth), and is cited in *Lloyd on Trade Marks*, p. 3.

In France the law dealt with the offender, and administered punishments similar to those that were prescribed in cases of forgery. *A. Rendu*, in his treatise entitled "*Traité Pratique des Marques de Fabriques et de Commerce et de la Concurrence Déloyale*," (p. 5) thus lays down the principles that early governed the Courts of Law in France in acting and interfering for the protection of Trade Marks :

Le principe de la propriété des Marques de Fabrique ou de Commerce est dans la nature même des choses, l'application de cette règle de suprême justice : à chacun le sien : *sum cuique*. C'est la conséquence directe du droit de *propriété* existant sur les objets que l'on fabrique ou que l'on vend. . . . si sa fabrication a un mérite qui fasse rechercher les choses qui sont reconnues émaner d'elle, il (l'industriel) a droit de jouir seul du bénéfice de la *réputation* acquise à ses produits ; il a droit d'empêcher qu'on usurpe le bénéfice de cette réputation en usurpant le signe distinctif des objets ; en d'autres termes, il a droit à l'usage exclusif, c'est-à-dire à la propriété, de sa marque."

The first Statutory provision in France for the protection of Trade Marks appears to have been la loi du 18 Germinal, An. XI., qui dans les Articles 16, 17, 18, reconnaît les Marques de Fabrique comme un droit pour chaque manufacturier ou artisan ; elle punit leur usurpation ou contrefaçon des mêmes

peines que le faux en écriture privée, et depuis la loi du 28 Juillet, 1824, punit la falsification des Marques de Commerce de la peine de l'emprisonnement et d'une amende et dommages-intérêts.

The decisions of the Courts of Law in England and France have established the nature of the wrong suffered by the trader whose Mark is wrongfully used to be two-fold, consisting:

First, in the injury to his *reputation*, where an article of inferior value is palmed off upon the purchaser;

Second, in the injury done to his *trade* by the general loss of custom—either is a sufficient ground of action. (See *Southern v. Howe*, 1 Popham 43; *Blofield v. Payne*, B. & Ad. 410; *Rodgers v. Nowell*, 5 C. B. 109; also, *Lloyd on Trade Marks*, p. 14.)

In England an action may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed Mark of the plaintiff, where the Mark used by the defendant resembles the plaintiff's so closely as to be *calculated to deceive* and induce purchasers to believe the defendant's goods to be of the plaintiff's manufacture. (*Rodgers v. Nowell*, 5 C. B., 109.)

The question is not how great or how small the difference is between the imitation and the original article; but whether or not the purchaser would, on the whole, be likely to be deceived by the appearance of the former. In *Schrington v. Leigh* (18 Beaver, p. 164) it was simply the use of the two words "Conveyance Company" that was restrained.

A protection to Trade Marks by an enactment providing for Registering them is afforded, by establishing a presumption in favor of the proprietor who avails himself of it; for in Trade Marks priority is the basis of title. (*Lloyd*, p. 56.) This is also in accordance with French Jurisprudence.

"Le dépôt d'un Marque de Fabrique n'est pas attributif d'un droit de propriété sur cette Marque, mais établit seulement au profit du déposant une présomption de propriété, qui peut être détruite par la preuve que font d'autres fabricants d'une usage de la Marque antérieur au dépôt." (Cour Imp. de Metz, du 31 Déc., 1861; *Sirey*, Vol. 1862, Part 2, p. 341. Jugé également, Cour Imp. de Montpellier, du 17 juin, 1862; *Sirey*, Vol. 1862, Part 2, p. 526.)

The Law of Trade Marks and the Trade Mark Act of 1868 (31 Vict. c. 25) for the protection of Trade Marks in Canada, are based on the same general principles that prevail in England, France, and in the United States. The Trade Mark Act provides that the party registering his Trade Mark shall thereafter "*have the exclusive right to use the same*;" and also punishes the use of such Trade Mark by any other person by a penalty to be paid to the proprietor of the Trade Mark. And by section 11 "the use of any Trade Mark, either identical with that of any manufacturer, producer, packer or vendor, or so closely resembling it as to be *calculated to be taken for it* by ordinary purchasers, shall be held to be a use of such Trade Mark."

United States Decisions.

Decisions of the Supreme Court of the United States—rendered generally after exhaustive arguments in contests between the State and Federal Governments—are cited, for the reason that they are often a guide, if not an authority, in defining the extent of the powers over the same matters which are in similar language committed by the Constitutional Act of this Dominion upon the Federal Government. It must be borne in mind that, although such powers as are not delegated to the U. S. Federal Government are reserved to the States, still, “the sovereignty of the United States, though limited as to specified objects, is plenary as to those objects.” (*Gibbons v. Ogden*, 9 Wheat. 194).

And thus, though in the distribution of powers the objects and classes of subjects over which the legislative control has been given to the United States Federal Government has been limited and restricted, this does not affect its supreme power of legislation upon such objects as have been confided to it.

In the distribution of powers between the Federal and State Governments, the United States Constitution has confided to the general Government “the regulation of commerce” (Art. 1, sec. 8, sub-s. 3), but not the regulation of trade generally.

Still the following decisions of the Supreme Court of the United States giving a judicial consideration and construction of the “Commerce” power vested by the U. S. Constitution in the Federal Government of that Republic, show that Congress has an unlimited jurisdiction in the regulation of every species of inter-State and foreign commercial intercourse.

In *Brown v. State of Maryland* (12 Wheaton, U. S., S. C. 419), Held :

That an Act of a State Legislature requiring importers of foreign goods to take out a license, for which they shall pay 50 dollars, and in case of neglect or refusal to take out such license subjecting them to certain penalties, is repugnant to that provision of the Constitution of the United States which declares that “no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,” and to that which declares that Congress shall have “power to regulate commerce with foreign nations, and among the several States.”

Held, also, that a tax on the occupation of an importer was a tax on importation.

In *Cook v. State of Pennsylvania*, (97 U. S., S. C. 566) 1878, Held :

That the Statute of Pennsylvania of May 20, 1853, modified by that of April 9, 1859, requiring every auctioneer to collect and pay into the State treasury a tax on his sales, is, when applied to imported goods, sold in the original packages for the importer, in conflict with Art. 1 of the Constitution of the United States, and therefore void,

first, as laying a duty on imports (forbid by sec. 10), and, second, as being a regulation of commerce, a power given exclusively to the general Government.

Held, also, that a State tax on sales made by an auctioneer is a tax on the goods sold.

In *Welton v. State of Missouri* (91 U. S., S. C. 280), Held :

That a license tax required by a State of travelling traders, for the sale of goods not of its own product or manufacture is, in effect, a tax, upon the goods themselves. It is an attempt to discriminate injuriously against the products of other States and the rights of their citizens, and an infringement of the power vested in Congress to insure uniformity of commercial regulation against discriminating State legislation.

Mr. Justice Field, in delivering the opinion of the Court, said : Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it, embraces all the instruments by which such commerce may be conducted. . . . The non-exercise by Congress of its power to regulate commerce among the several States is equivalent to a declaration by that body that such commerce shall be free from any restrictions.

In *Railroad Co. v. Husen* (95 U. S., S. C. 465), Held :

That the Statute of Missouri, which prohibits driving or conveying any Texas, Mexican or Indian cattle into the State between the first day of March and the first day of November in each year, is in conflict with the clause of the Constitution that ordains "Congress shall have power to regulate commerce, &c." Mr. Justice Strong, who delivered the opinion of the Court, said : "Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution.

Many Acts of a State may indeed affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. . . . While we unhesitatingly admit that a State may pass laws for the protection of life, liberty, health, or property within its borders . . . it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection."

In *Inman Steamship Co. v. Tinker* (94 U. S., S. C. 246), Held :

That a State Statute empowering and requiring all vessels entering

a harbor in the State to pay a tax of three cents per ton is unconstitutional as imposing a duty on tonnage.

In *Norris v. City of Boston* (Passenger Tax Case, 7 How. 283), Held :

That the Statutes of the States of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, arriving in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws ; and that the commerce of the United States includes an intercourse of persons as well as the transportation of merchandise.

3. That the Acts of Massachusetts and New York, in question in these cases, conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries freely and securely to come with their ships and cargoes to all places, ports and rivers in the territories of each country to which other foreigners are permitted to come.

In *Henderson et al. v. Mayor of New York et al.* (92 U. S., S. C. 265), Held :

That a State Law which, under the pretence of protecting the State from pauper immigration, compels the owner or consignee of every vessel arriving at the port of New York to give a bond of indemnity for every passenger in a penalty of \$300, against any expenses that may be incurred for his relief or support for four years thereafter ; or, instead and as a commutation of such bond, to pay a tax of \$9.50 for each passenger within 24 hours after his landing, is, in effect, a tax on the passenger and a regulation of commerce, and, when applied to passengers from foreign countries, is a regulation of commerce with foreign nations.

In *Crandall v. State of Nevada* (6 Wall, U. S., S. C. 35), Held :

That a State law requiring those in charge of all the stage-coaches and railroads doing business in the State to make report of every passenger who passed through the State, or went out of it by their conveyance, and to pay a tax of one dollar for every such passenger, was unconstitutional and void, as inconsistent with objects for which the Federal Government was established and with rights of transit conferred by the Constitution on the people

That such a tax is a tax on the passenger for the privilege of passing through the State by the ordinary modes of travel, and is not a simple tax on the business of the Companies.

In *Hall v. De Cuir* (95 U. S., S. C. 487), Held :

That an Act of the State of Louisiana requiring all those engaged in inter-State commerce to give all persons travelling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance without distinction of race or color is a regulation of inter-State commerce, and seeks to impose a direct burden thereupon, and, therefore, to that extent, unconstitutional and void.

In *Cook v. State of Pennsylvania* (97 U. S., S. C. 566), Held :

That a tax laid by a State on the amount of sales of goods made by an auctioneer is a tax on the goods so sold.

And when applied to imported goods in the original packages by him sold for the importer is in conflict with sect. 8 and 10 of Art. 1 of the U. S. Constitution, and therefore void as laying a duty on imports and being a Regulation of Commerce.

In *Chy Lung v. Freeman et al* (92 U. S. S. C. 275), Held :

That a Statute of California which forbids the landing of certain classes of alien passengers from a vessel, unless the master or owner of the vessel gives a separate bond for each of such passengers, for the future protection of the State against the support of such passenger, or, pays such sum as the Commissioner of Immigration chooses to exact, invades the right of Congress to regulate commerce with foreign nations, and is therefore void.

Mr. Justice Miller, in delivering the opinion of the Court, said :
“ We are not called upon by this Statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.”

A Provincial tax upon Chinese Immigrants has been declared by the Supreme Court of British Columbia as *ultra vires* of the Local Legislature.

See Todd's Parl. Gov. in Col. (pp. 154-159) for a critical review of the Colonial legislation designed to prevent Chinese immigration.

It appears from this review that an attempt was made to put a stop to the rapid influx of Chinese immigrants into the Colony of Queens-

land, by means of a Bill discriminating against all Asiatic or African aliens. This Bill imposed a tax upon such immigrants of ten pounds for a business license, and a tax of three pounds for a miner's license, the ordinary tax being ten shillings for a miner's license and four pounds for a business license. The Bill was reserved by the Governor for the Royal approval as being at variance with Treaty stipulation of the Imperial Government.

The conduct of the Governor was approved by the Colonial Secretary (Lord Carnarvon), and the Governor was informed that the Colonial Secretary could not advise the Queen that the Bill in that shape should receive the Royal assent. Subsequently a Bill without these objectionable features was passed and received the Royal assent.

In *Foster v. Master and Wardens of the Port of New Orleans* (94 U. S., S. C. 246), Held :

That the Act of the Legislature of Louisiana providing for the inspection of the hatches of every seagoing vessel coming to the Port of New Orleans, and attaching a penalty to the neglect of this duty by ship owners, was a Regulation of Commerce, and unconstitutional and void, and that it was not to be classed as an inspection law, the object of which is to certify the quantity and value of the articles inspected, for the protection of buyers and consumers.

Swayne, J., in delivering the opinion of the Court, said :

Besides the unreason and the oppressive character of the Act as regards ship owners and consignees, it is an invasion of the rights of persons outside of these classes. If such a monopoly sustained by such a sanction may be validly given to the master and wardens, why may they not also, at prices not agreed upon by the parties, nor according to the market value, but at rates arbitrarily fixed by law, be authorized exclusively to load and unload ships, to furnish them with all needful supplies, and to perform all the services of consignees, commission merchants, and ship-brokers touching incoming and outgoing cargoes ?

In expressing these views we have no purpose to impugn anything heretofore said by this Court as to the power of the States to establish inspection, quarantine, health and other regulations, within the sphere of their acknowledged authority.

The constitutional validity of such regulations is as clear as the power of Congress to establish regulations of commerce. It is no objection to the former that both operate upon the same subject.

In *Steamship Company v. Port Wardens* (6 Wall. 31), Held :

That a Statute of a State enacting that the Master and Wardens of a port should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called on to perform service or not, for every vessel arriving in that port, was a regulation of commerce, and was unconstitutional and void.

In *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (96 U. S., S. C. 1), Held :

That under the powers conferred upon Congress to "regulate commerce," the Electric Telegraph, as a powerful agency of commerce and inter-communication, comes within the controlling power of Congress as against hostile State legislation, and a Statute of Florida attempting to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory is inoperative and void as conflicting with these powers.

In *Siennott v. Davenport* (22 How. 227), and *Foster v. Davenport* 22 How. 244), Held :

That towboats and steamboats as instruments of commerce, when federally regulated and licensed, are not subject to State legislation.

In *Gibbons v. Ogden* (9 Wheaton, U. S., S. C. 1), Held :

That the Acts of the Legislature of the State of New York granting to Robert R. Livingston and Robert Fulton the *exclusive* navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the Constitution of the United States which authorizes Congress to regulate commerce, so far as the said Acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade from navigating the said waters by means of fire or steam.

In *Veasie et al v. Moor* (14 How. 569), Held :

That a license to prosecute the coasting trade procured from the collector of the Port of Bangor conveys no privilege to use free of tolls, or of any condition whatever, the canals constructed by a State, or the water courses partaking of the character of canals exclusively within the interior of a State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end.

3. The raising of Money by any Mode or System of Taxation.

In *Dow v. Black*, L. R. 6 P. C. 282, their Lordships held :—

That the 3rd Article of Sect. 91 is to be reconciled with the 2nd Article of Sect. 92 by treating the former as empowering the Supreme

Legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the Provincial Legislature to direct taxation within the provinces for provincial purposes.

5. Postal Service.

The Pensacola Telegraph Company v. Western Union Telegraph Company, 96 U. S., S. C. 1:

The Act of Congress of July 24, 1866, entitled "An Act to aid in the construction of Telegraph lines and to secure to the Government the use of the same for postal, military and other purposes, so far as it declares that the erection of telegraph lines shall, as against State interference, be free to all who accept its terms and conditions, and that a Telegraph Company of one State shall not, after accepting them, be excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to execute the Powers of Congress over the Postal Service.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of CANADA.

In *Leprohon v. City of Ottawa* (2 Ont. App. 522), Held, by a unanimous Court, (Present:—Spragge, C., Hagarty, C. J., C. P., Burton & Patterson, J. J. A.)

That a Provincial Legislature has no power under sub-sections 2, 8, 13 and 16 of sec. 91 of B. N. A. Act to impose a tax upon the official income of an officer of the Dominion Government.

That the salary of an officer of the Dominion Government fixed by the Parliament of Canada is not subject to reduction by the imposition of a tax made directly or indirectly by or through a Provincial Legislature. (Reversing 40 U. C., Q. B., 478.)

Held, further (adopting the reasoning of the Supreme Court of the United States in *McCulloch v. Maryland*, 4 Wheaton, 428), that all subjects over which the Sovereign power of the local Provincial Government extends, are objects of taxation, those over which it does not extend are exempt from taxation; and that this power does not extend to those means or instruments employed by the Dominion Government to carry into effect the powers conferred upon that body.

That all Government officers as public servants of the Dominion Government are an essential part of the means and instruments by which the Government of the Dominion is carried on, and as such are not objects of taxation by the Local Government.

Spragge, C., said: The powers of the Dominion Legislature and of the Provincial Legislature are distributed in classes assigned to each. The Provincial Legislature having only the powers specifically conferred; the Dominion Legislature having, besides those specifically conferred, all powers not specifically conferred upon the Local Legislature.

In *Evans et al. v. Hudon et al.*, (22 L. C. J., p. 268:)

Held, that the Legislature of the Province of Quebec has not the power to declare seizable the salaries of employees of the Federal Government and that the exemption of the salaries of public employees from seizure is a matter of public order.

In *McCulloch v. The State of Maryland* (4 Wheat. 429), held:

' That the State Governments have no right to tax any of the Constitutional means employed by the Government of the Union to execute its Constitutional powers.

See sect. 92, ss. 13, as to the powers of the Federal and Provincial Governments in the regulation of the business of Insurance Corporations.

10. Navigation and Shipping.

The exclusive power of making laws relating to the navigation upon the navigable waters throughout the Dominion has been confided to the control of the Parliament of Canada. Cooley observes (Cons. Limit. p. 589):

That the term "navigable" at Common Law was only applied to those waters where the tide ebbed and flowed, but all streams which were of sufficient capacity for useful navigation, though not called navigable, were public, and subject to the same general rights which the public exercised in highways by land. There has been a very general disposition to consider all streams public, which are useful as channels of commerce, wherever they are found of sufficient capacity to float the products of the mines, the forests, or the tillage of the country to market.

(p. 593). The State has the same power of regulating the speed and general conduct of ships or other vessels navigating its water highways, that it has to regulate the speed and conduct of persons and vehicles upon the ordinary highways, subject always to the restriction that its regulations must not come in conflict with any regulations established by Congress.

In *King v. Russell* (6 Barn. and Cress. 593), Sir John Bayley said:

The right of the public upon the waters of a port or navigable river is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient thereto.

Unless there are facilities for loading and unloading, of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore and landed in shallow water on the shore. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharves and quays, and, what is perhaps an improved species of loading wharf, a staith. But, upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the water way into solid ground; but it advances some of the purposes of a port—its trade and commerce. Is there any other legal principle upon which they can be allowed?—Make an erection for pleasure, for whim, for caprice, and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and the interests of commerce give it protection, and it is a justifiable erection and not a nuisance.

In *McBean v. Carlisle et al*, (19 L. C. J. 276), Held :

That the public are entitled to all the advantages which a river in its natural state can afford for public purposes, and that there is no difference in that respect whether the river is navigable or not, or floatable or not; that it is the necessary consequence of this right of servitude that whoever impedes the natural flow of a river is liable to the damages occasioned thereby, and may be compelled either to remove the obstructions or to provide facilities equal to those the river afforded before the obstructions were made.

Dorion, C.J., in delivering the Judgment of the Court, said :

In the cases of *Oliver and Boissonneault* (Stuart's Rep., p. 526) and *Chapman & Clarke* (8 L. C. R., p. 147) the Courts held that mill-owners could not impede the floating of timber by the erection of booms.

Proudhon, Dom. Pub., vol. 3, No. 683, cites an *arrêt* of 26th February, 1569, which ordered that slides should be made in every dam to facilitate the passage of floating timber.

In *Oliva and Boissonneault*, Chief Justice Sewell is reported to have said : " In every river which is navigable for boats or large vessels, or in every river which is floatable, that is, capable of floating logs or rafts (*Nouveau Denizart*, Vo. Flottage,) the public, as in England (*Hale de jure Maris*, C. 3, p. 309) and in America (3 Kent's Com., p. 344) have an easement or legal servitude, similar to the right of passage in a public highway.

Normand et al v. The St. Lawrence Steam Navigation Co. (4 Q. L. R. 1), Polette, J., jugé que :

Par l'Acte de l'Amérique Britannique du Nord, 1867, le Gouvernement de la Puissance du Canada ayant toute l'autorité législative et exécutive sur la navigation et les batiments, et par conséquent, sur les rivières navigables et sur leurs lits, de même que sur leurs bords et rivages, quant à ce qui peut être nécessaire à la navigation, le Gouvernement de la Province de Québec n'a pas le pouvoir d'émettre des Lettres-Patentes octroyant un lot de terre à eau profonde dans une rivière navigable.

Bell v. La Corporation de Québec (2 Q. L. R. 305), Dorion, J., jugé que :

Les pouvoirs donnés à une Corporation de faire un aqueduc et tous les travaux nécessaires pour introduire l'eau dans une localité ne lui donnent pas le droit de faire des constructions nuisibles à la navigation sur une rivière navigable.

Regina v. Peters (2 Pugs. 352), Supreme Court, New Brunswick.

By 3 Vict., c. 70, the Corporation of St. John was authorized to make laws for the regulation of the Branch Pilots of St. John. Under this authority, before 1867, by-laws were made accordingly. In 1869 the city made another by-law relating to Pilots. Held, per Ritchie, C. J. :

That the regulation of Pilotage belonged to the Parliament of Canada under 91st sec. of B. N. A. Act of 1867, and after the passing of that Act the power to make by-laws relating to Pilots ceased.

Fisher & Wetmore, J.J., dissenting, Held : That under the 129th sec. of B. N. A. Act the power of the Corporation to make by-laws under 3 Vict., c. 70, was continued until the Parliament of Canada, legislated on the subject, and that the by-law was therefore valid.

In *Ex parte Langan* (3 Allen 135), Held, by the Supreme Court of New Brunswick, that the by-laws regulating Pilots and Pilotage, passed since the B. N. A. Act, 1867, by the Corporation of St. John, N.B., are *ultra vires* of the Provincial or Municipal Governments ; the Confederation Act having given the exclusive power of legislation as to *Navigation and Shipping* to the Dominion Parliament.

Chief Justice Savage in *The People v. The Rensselaer and Saratoga Railroad Co.* (15 Wend 113), speaking of the State power to erect bridges over navigable waters under the United States Constitution, said :

Such power certainly did exist in the State Legislatures before the delegation of power to the Federal Government by the Federal Constitution. It is not pretended that such a power has been delegated to the general government or is conveyed under the power to regulate commerce and navigation.

It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied,—that is, the power to erect bridges over navigable streams must be so far surrendered as may be necessary for a free navigation upon those streams. By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary.

In *State of Pennsylvania v. The Wheeling and Belmont Bridge Company* (18 How. 421), Held :

That the provisions of the Act of Congress declaring certain bridges over the Ohio River to be lawful structures at their then height and position are within the legitimate exercise by Congress of its constitutional power to regulate commerce.

In *The Eliza Keith v. The Langshaw*, (3 Q. L. R. 143, Vice Admiralty Court), held :

That the Admiralty rule which prevails in England as to damages in cases of collision is overruled by the Dominion Act respecting the navigation of Canadian waters (31 Vict., c. 58) passed in 1868, the B. N. A. Act of 1867 having conferred upon the Parliament of Canada legislative authority over all matters occurring in Canadian waters, within the subjects of navigation and shipping.

In *The Propellor Genesee Chief et al. v. Fitzhugh et al.* (12 Howard, p. 443), held :

That the Admiralty and Maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a Foreign Nation.

12. Sea Coast and Inland Fisheries.

Sea Coast Fisheries.

The Sea Coast Fisheries being liable to become again a subject of contention between England and Canada on one side and the United States on the other, it is proper to state here how the question now stands, and what would be the respective position of the two countries should the Treaty of Washington, of May 8, 1871, be terminated.

When that Treaty was passed the Sea Coast Fisheries were regulated by the Convention signed in London, on the 20th October, 1818.

Article I of this Convention is in these words :—

“Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry, and cure fish on certain coasts, bays, harbours and creeks of His Britannic Majesty’s

dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company; and that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same or any portion thereof shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce for ever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as shall be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

THE Articles in the Treaty of Washington relating to the Fisheries, and in virtue of which a Commission was constituted and sat in Halifax, are Articles XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXXII and XXXIII. They are as follows:

"ARTICLE XVIII.

"It is agreed by the High Contracting Parties that in addition to the liberty secured to the United States fishermen by the Convention between Great Britain and the United States, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of

Her Britannic Majesty the liberty, for the term of years mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish ; provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

" It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouth of rivers, are hereby reserved exclusively for British fishermen.

" ARTICLE XIX.

" It is agreed by the High Contracting Parties that British subjects shall have, in common with the citizens of the United States, the liberty for the term of years mentioned in Article XXXIII of this Treaty, to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid for the purpose of drying their nets and curing their fish ; provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

" It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

" ARTICLE XX.

" It is agreed that the places designated by the Commissioners appointed under the 1st Article of the Treaty between Great Britain and the United States, concluded at Washington on the 5th of June, 1854,

upon the coasts of Her Britannic Majesty's Dominions and the United States, as places reserved from the common right of fishing under that Treaty, shall be regarded as in like manner reserved from the common right of fishing under the preceding Articles. In case any question should arise between the Governments of the United States and of Her Britannic Majesty as to the common right of fishing in places not thus designated as reserved, it is agreed that a Commission shall be appointed to designate such places and shall be constituted in the same manner, and have the same powers, duties, and authority as the Commission appointed under the said 1st Article of the Treaty of the 5th of June, 1854.

“ARTICLE XXI.

“It is agreed that, for the term of years mentioned in Article XXXIII of this Treaty, fish oil and fish of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil), being the produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country respectively, free of duty.

“ARTICLE XXII.

“Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII of this Treaty are of greater value than those accorded by Articles XIX and XXI of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII of this Treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States' Government, in a gross sum, within twelve months after such award shall have been given.

“ARTICLE XXIII.

“The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say: One Commissioner

shall be named by Her Britannic Majesty, one by the President of the United States, and a third by Her Britannic Majesty and the President of the United States conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Article shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

“The Commissioners so named shall meet in the City of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

“Each of the High Contracting Parties shall also name one person to attend the Commission as its agent, to represent it generally in all matters connected with the Commission.

“ARTICLE XXIV.

“The proceedings shall be conducted in such order as the Commissioners appointed under Articles XXII and XXIII of this Treaty shall determine. They shall be bound to receive such oral or written testimony as either Government may present. If either party shall offer oral testimony, the other party shall have the right of cross-examination, under such rules as the Commissioners shall prescribe.

“If in the case submitted to the Commissioners either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Commissioners may require.

“The case on either side shall be closed within a period of six months from the date of the organization of the Commission, and the

Commissioners shall be requested to give their award as soon as possible thereafter. The aforesaid period of six months may be extended for three months in case of a vacancy occurring among the Commissioners under the circumstances contemplated in Article XXIII of this Treaty.

“ARTICLE XXV.

“The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a Secretary and any other necessary officer or officers to assist them in the transaction of the business which may come before them.

“Each of the High Contracting Parties shall pay its own Commissioner and Agent or Counsel: all other expenses shall be defrayed by the two Governments in equal moieties.

“ARTICLE XXXII.

“It is further agreed that the provisions and stipulations of Articles XVIII to XXV of this Treaty, inclusive, shall extend to the Colony of Newfoundland, so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States, shall not embrace the Colony of Newfoundland in their laws enacted for carrying the foregoing Articles into effect, then this Article shall be of no effect; but the omission to make provision by law to give it effect, by either of the Legislative bodies aforesaid, shall not in any way impair any other Articles of this Treaty.

“ARTICLE XXXIII.

“The forgoing Articles XVIII to XXV, inclusive, and Article XXX, of this Treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said Articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the High Contracting Parties shall have given notice to the other of its wish to terminate the same; each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said period of ten years, or at any time afterward.”

The Acts necessary to enable these Articles to be carried into effect were passed by the Imperial Parliament of Great Britain on the 6th August, 1872; by the Parliament of Canada on the 14th June, 1872; by the Legislature of Prince Edward Island (which did not at that time form part of the Dominion) on the 29th June, 1872; and by the United States Congress on the 25th of February, 1873. A Proclamation, dated Washington, 7th June, 1873, fixed the 1st of July of that year as the day on which these Articles should come formally into operation.

In the case of Newfoundland, it was not until the 28th of March, 1874, that the necessary Act was passed by that Colony; and a Proclamation, issued on the 29th of May of the same year, fixed the 1st day of June, 1874, as the day on which the Fishery Articles of the Treaty of Washington, so far as they relate to Newfoundland, should come into effect.

In order to estimate the advantages derived respectively by the fishermen of the United States and of Great Britain, under the terms of the first portion of Article XVIII of the Treaty of Washington, of 1871, the Commission had to determine the value of the privileges granted to each country respectively by Articles XVIII, XIX, and XXI of that Treaty, *which were not enjoyed under the 1st Article of the Convention of the 20th October, 1818.*

Articles XVIII and XXI of the Treaty of Washington superadded to the privileges conferred upon the United States' citizens by the Convention of 1818:—

(1.) "The liberty to take fish of every kind except shell fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores, and Islands, and also upon the Magdalen Islands, for the purpose of drying their nets or curing their fish; provided that in so doing, they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

"It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

(2.) "The admission into Canada of 'fish oil and fish of all kinds, (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil) being the produce of the Fisheries of the United States,' free of duty.

(3.) "The enjoyment of these privileges to continue during a period of 12 years certain.

“Similar privileges are granted by Article XXXII in regard to the Colony of Newfoundland.”

Articles XIX and XXI confer the following privileges upon British subjects:—

(1.) “The liberty to take fish of every kind except shell fish, on the eastern sea-coasts and shores of the United States north of the 39th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea coast and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid for the purpose of drying their nets and curing their fish; provided that in so doing, they do not interfere with the rights of private property or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

“It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries and all other fisheries in rivers and mouths of rivers are hereby reserved exclusively for fishermen of the United States.”

(2.) The admission into the United States of “fish-oil and fish of all kinds (except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil) being the produce of the fisheries of the Dominion of Canada, or of Prince Edward Island” free of duty.

(3.) The enjoyment of these privileges to continue during a period of 12 years certain.

Article XXXII extends the above-mentioned privileges, so far as they are applicable, to the Colony of Newfoundland.

Upon this basis Great Britain asserted that the privileges specified in Article XVIII of the Treaty of Washington, of 8th May, 1871, exceeded in value the privileges specified in Articles XIX and XXI, and claimed \$12,000,000 for the Dominion of Canada and \$2,880,000 for Newfoundland.

A Commission composed of His Excellency Monsieur Maurice Delfosse, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of the Belgians, at Washington, named by the Ambassador at London of the Emperor of Austria-Hungary; the Hon. Ensign H. Kellogg, named by the President of the United States; and Sir Alexander T. Galt, K.C.M.G., named by Her Britannic Majesty, met at Halifax, Nova Scotia, on the 15th day of June, 1877, and proceeded to hear the evidence and arguments of Counsel of the Contracting Parties.

At the Meeting of 1st September, 1877, the Counsel and Agent of the United States moved the Commissioners to rule and declare that:—

It is not competent for this Commission to award any compensation for commercial intercourse between the two countries, and the advantages resulting from the practice of purchasing bait, ice, supplies, etc., etc., and from being allowed to tranship cargoes in British waters, do not constitute good foundation for an award of compensation, and shall be wholly excluded from the consideration of this tribunal.

On the 6th September, 1877, the Commission, having considered the motion submitted by the Agent of the United States at the Conference held on the 1st decided unanimously :

That it is not within the competence of this Tribunal to award compensation for commercial intercourse between the two countries, nor for the purchasing of bait, ice, supplies, &c., &c., nor for the permission to tranship cargoes in British waters."

After this decision was rendered, Sir Alexander T. Galt, among other things, said :

I find that the effect of the motion, and of the argument which has been given upon it, is to limit the power of this tribunal to certain specified points. This definition is undoubtedly important in its consequences. It eliminates from the consideration of the Commission an important part of the case submitted on behalf of Her Majesty's Government, so far as this part forms a direct claim for compensation ; but at the same time, it has the further important effect that it defines and limits the rights conceded to the citizens of the United States under the Treaty of Washington.

I confess to a great feeling of disappointment that such an important part of the question connected with the settlement of the fisheries dispute should apparently be removed, or partly removed, from the possible consideration and adjudication of this tribunal, and I am bound to say that my conviction of the intention of the parties to the Treaty of Washington is that this was not their purpose at the time.

But I am met by the most authoritative statement, as to what were the intentions of the parties to the Treaty. There can be no stronger or better evidence of what the United States proposed to acquire under the Washington Treaty, than the authoritative statement which has been made by their Agent before us here, and by their counsel. We are now distinctly told that it was not the intention of the United States, in any way, by that Treaty, to provide for the continuation of these incidental privileges, and that the United States are prepared to take the whole responsibility, and to run all the risk of the re-enactment of the vexatious statutes, to which reference has been made.

The responsibility is accepted by and must rest upon those who appeal to the strict words of the Treaty as their justification.

On the 23rd day of November, 1877, the Commission closed their proceedings by rendering the following award :

The undersigned Commissioners appointed under Articles XXII and XXIII of the Treaty of Washington of the 8th of May, 1871, to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty, as stated in Articles XIX and XXI of said Treaty, the amount of any compensation which in their opinion ought to be paid by the Government of the United States to the Government of Her Britannic Majesty, in return for the privileges accorded to the citizens of the United States under Article XVIII of the said Treaty ;

Having carefully and impartially examined the matters referred to them according to justice and equity, in conformity with the Solemn Declaration made and subscribed by them on the Fifteenth day of June, One Thousand Eight Hundred and Seventy-seven :

AWARD the sum of Five Millions Five Hundred Thousand Dollars, in gold, to be paid by the Government of the United States to the Government of Her Britannic Majesty in accordance with the provisions of the said Treaty.

Signed at Halifax, this twenty-third day of November, One Thousand Eight Hundred and Seventy-seven.

MAURICE DELFOSSE,
A. T. GALT.

The United States Commissioner is of opinion that the advantages accruing to Great Britain under the Treaty of Washington are greater than the advantages conferred on the United States by the said Treaty, and he cannot therefore concur in the conclusions announced by his colleagues.

And the American Commissioner deems it his duty to state further that it is questionable whether it is competent for the Board to make an award under the Treaty, except with the unanimous consent of its members.

E. H. KELLOGG,
Commissioner.

The question of a unanimous award would hardly have been put forward, if, in the same Treaty, it had not been formally stated that, as regards the commission which would sit at Geneva for the settlement of the American claims resulting from the destruction of property by the steamer *Alabama*, a majority award should prevail.

The abstract question has been variously treated by writers, and a distinction has been raised between private and international arbitrations, many holding that in the absence of agreement giving the majority power to render an award, arbitrators must be unanimous in arbitrations concerning private matters,—but that in public or international arbitrations a majority is competent to make an award. It is obvious that an arbitration which would place the result in the hands and at the mercy of one of the parties would be a mockery, and the American nation were too sensitive of their dignity to adopt such a narrow view, and they set the question at rest by paying the amount awarded.

The precedent is valuable, in interpreting International Treaties in the future; and is more so on account of this peculiar stipulation of the Geneva arbitration, which might create a strong presumption for insisting on a unanimous award in the absence of such stipulation as regards the Halifax Commission.

It would be preferable in such instruments to abstain from any reference to a majority award, as it is liable to perpetuate doubts on a question which should be now considered as finally settled.

There are, however, many details in Treaties which cannot be regulated by any principle of law, and which should suggest the greatest attention. In this very Treaty of Washington it was agreed that fish and fish oil should be admitted duty free, and, by strict interpretation, the United States Government exacted and still exact duty on cans containing the freed article. The motion submitted to the Halifax commission to strike out of the British claim all considerations resulting from transshipment of cargoes, purchasing of bait, ice and supplies, and from commercial advantages generally, shows how guarded treaty makers should be.

Another instance must be noted: because the whole North American British Colonies were not specifically mentioned in the Washington Treaty, British Columbia is now excluded from its operation, for the reason that it did not then form part of Canada.

In re Arbitration between the Provinces of Ontario and Quebec, (6 Can., L. J. N. S., 212).

Held, by a majority of arbitrators that as the B. N. A. Act, 1867, confers powers on the arbitrators appointed thereunder, of a public nature, such powers may be exercised by the majority, and an award by all is therefore unnecessary.

Mowat & McFee, Supreme Court, Canada. (June, 1880.)

This case, which, not being yet officially reported, is given in the crude state of a daily newspaper report, presents very interesting questions of public law, verging on most intricate points of international law. The plaintiff, McFee, of St. John, New Brunswick, was engaged in the business of a fisherman on the Bay of Chaleurs. Mowat, the defendant, was fishery overseer for the Restigouche division. In July, 1876, McFee sent a boat and men out into the bay to drift the salmon. The drifting took place at night, but at daylight, next morning, Mowat saw the boat coming ashore with wet salmon drifting nets in it, contain-

ing one fish (a shad). Mowat seized both boat and nets, and declared them forfeited to the Crown, as being seized and confiscated "on view" under one of the provisions of the Fishery Act, 1868. McFee contended that he had a right to fish for salmon in the bay, how and when he liked, provided he kept more than three miles from shore, and, as he had gone more than three miles on the night in question, he brought an action against Mowat to recover the value of his boat and nets, and damages for being prevented from carrying on his business. The jury found that the fishing took place more than three miles from shore.

There was no doubt, however, that it was within the bay, as it was about opposite the River Charlo, and they gave McFee a verdict of \$900. The Court in New Brunswick refused to set aside the verdict, and held that, because Mowat had not seen the nets actually in the water and actually being used in drifting, he had no right to seize and confiscate them "on view." The question of the three-mile limit in the Bay of Chaleurs, and the right of a fishery officer to seize nets "on view" under such circumstances, were so important that the Government appealed the case to the Supreme Court of Canada, and that Court has unanimously reversed the judgment of the Court below and ordered a judgment to be entered for the defendant Mowat. The Supreme Court of Canada decided that the whole of the Bay of Chaleurs comes within the jurisdiction of the Parliament of Canada, and that the three-mile limit does not apply to it. With reference to the seizure "on view," Mr. Justice Gwynne, who delivered the judgment of the Court, said :

"The evidence given upon that subject was, in my opinion, sufficient, otherwise a most beneficial Act will be stripped of much of its efficiency. I do not think that the term 'on view' in the Act is to be limited to seeing the net in the water while in the very act of drifting; it appears to me if the party acting 'on view' himself sees what is testified by him, that would be sufficient to convict of the offence charged; that is, sufficient for the purposes of the Act. . . .

The fish here was a shad, not a salmon, but the net was wet, and it was sufficiently apparent that the fish was caught with the net; the defendant had therefore ocular demonstration that the net, which was a drifting salmon net, had been just recently used in the bay, and that the boat with the nets, had but reached the shore, on return from such use, when he seized them. This evidence appears to me to have been quite sufficient to come within the purview of the 4th sub-section of section 16 of the Fisheries Act, to justify the defendant to seize the materials, implements, and appliances so used."

On the trial it appeared that the defendant's servants were using the boat and nets for drifting for salmon in the Bay Chaleurs. The fishing took place inside the Bay Chaleurs, but how far from the mouth of the Bay is not shewn except by reference to Heron Island in the said Bay, which Island is more

than sixty miles from the mouth of the Bay. The configuration and dimensions of the Bay were not proved, but this was a matter, it was contended, of which the Court would take judicial notice: So held in *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, (L. R. 2 Appeal Cases, p. 415.)

The center of the Bay Chaleurs is the boundary between the Provinces of New Brunswick and Quebec, and the Counties of the Provinces bounded by the Bay are Restigouche in New Brunswick, and Bonaventure in Quebec.

The plaintiff claimed the right to drift for salmon in the Bay Chaleurs, so long as he kept at a greater distance from the mainland or shore than three miles, and this matter being in dispute the question was left to the Jury who found that "the fishing was not within three miles of any shore of the Dominion of Canada,"—that is, within three miles of the *land* or *shore* of Canada. There was, and there could be no dispute, as to the fishing being upon Canadian waters, if the Bay Chaleurs is a Canadian water.

It appeared, also, that the defendant was a Fishery officer of the Dominion, appointed under *The Fisheries Act* 1868 for a district of the Restigouche River, which river flows into the Bay of Chaleurs, but it was not shewn that the limits of the district, for which he was appointed, extended to the place where the fishing was done, and where the seizure took place. The defendant did not see the plaintiff's servants actually engaged in the drifting, but saw them coming ashore with wet nets, and the latter admitted that they had been drifting for salmon, and defendant thereupon seized the boat and nets.

1. The first and most important question, which arises in this matter, is whether or not the Bay of Chaleurs is part of the territory or territorial waters of the Dominion, and therefore subject to the legislative authority of the Parliament of Canada.

The Bay of Chaleurs before the Union, it was contended, was the boundary between New Brunswick and Canada, and not subject to the territorial jurisdiction of either Province; and as the British North America Act simply joins together the several Provinces, it did not extend the limits of any Province, and consequently the Bay of Chaleurs is not part of the territory of Canada; if it is subject to any legislative authority, the Imperial Parliament has authority over it as an English Sea.

It was answered that the Bay of Chaleurs is a Canadian water, and part of the territory or territorial waters of Canada, and therefore subject to the laws of the Parliament of Canada, and that this appeared from the following considerations:—

(a.) By an act of the Imperial Parliament, 14 and 15 Victoria, Chapter 63 (printed in *Con. Stat. of New Brunswick*, pp. 51-63), entitled *An Act for the Settlement of the Boundaries between the Provinces of Canada and New Brunswick*, Parliament confirming the award of the Right Honorable Stephen Lushington and Travers Twiss, Doctor of Laws, defined the boundaries between Canada and New Brunswick (in that respect), as follows: "thence down the

“centre of the stream of the Restigouche to its mouth in the Bay of Chaleurs, “and thence through the middle of that bay to the Gulf of Saint Lawrence,” etc., and when, by the British North America Act, the Provinces of Canada and New Brunswick became part of the Dominion of Canada, the whole of the Bay of Chaleurs became part of the Dominion.

(b) The Bay of Chaleurs is wholly within the jaws of the land, and is a long bay or gulf, running up between the Provinces of Quebec and New Brunswick, and emptying into the Gulf of Saint Lawrence, which Gulf is the boundary, on the north, of both Provinces. The Bay of Chaleurs then, by the law of nations and by the law of England, is not a part of the high seas, but a part of the territory or territorial waters of Canada, and subject to the laws enacted by the Canadian Parliament. *Direct United States Co. v. Anglo-American Co.* (L. R. 2 App. Cases, 394–422); *The Queen v. Keyn* (L. R. 2 Ex. Div. 63–289).

2. As *The Fisheries Act* (1868) must be held to apply to the Bay of Chaleurs, and as the nets and boat were admittedly being used for drifting for salmon in the Bay of Chaleurs, whether within or without a limit of three miles from the land or shore of New Brunswick or Quebec, makes no difference, they *became confiscated* to Her Majesty under section 16, sub-section 4, of that Act.

Further than that, the boat and nets were afterwards, and after due hearing of the matter, adjudged to be confiscated. As to the jurisdiction of the magistrate, section 18, sub-section 3, of the said Act is conclusive. By that sub-section it is enacted that “where any offence under this Act is committed in, “upon, or near any waters forming the boundary between different counties, “or districts or fishery districts, such offence may be prosecuted before any “magistrate in either of such counties or districts,” etc.

The questions raised in this case have been the subject of a very exhaustive review of the international law, in the answer of the Crown’s Counsel, before the Halifax Fishery Commission, to the Brief of the United States. It embraces :

1. The three miles limit, as regard, the right of fishing on the high sea, especially the Bay of Chaleurs, and all the Bays of America, more than six miles wide,—with the incidental question of the headland controversy.

2. The procedure of seizure, which is assimilated to the Customs forfeitures and seizures on land,—by the law of England, of the United States, and of Canada,—reversing the rule of the common law, which obliges the plaintiff to prove the right he is seeking to enforce, and throwing upon the defendant the burden of proving that his goods, ships, or other property are not liable to seizure.

The document referred to is too lengthy for a work of this description, but on all questions of that nature it will be found profitable to consult it.

Inland Fisheries.

The Parliament of Canada is also empowered under this section to pass the necessary laws for protecting the breed of fish, and for regulating the taking and curing of fish and the trade in fish generally. (See Fisheries Act, 38 Vict., Can., p. cviii).

It has been held moreover by the following decision that, under this section, the Dominion Parliament is authorized to grant an exclusive license to fish in a non-tidal river when the bed of the river is in the Crown, although such a power could not lawfully have been exercised by the late Provincial Government.

In *Robertson v. Steadman et al* (3 Pugsley, 621), the Supreme Court of New Brunswick, after an examination and discussion of the powers granted to the Dominion Parliament over Inland Fisheries and Rivers by this section and schedule 3, ss. 5 (declaring rivers to be the property of Canada), and by the Fisheries Act of Canada (31 Vict., c. 60) decided that the Parliament of the Dominion had authority to legislate respecting the Inland Fisheries of the Province and to grant an exclusive license or right to fish in a non-tidal river to a private individual.

The action was an action of trespass against the defendants for breaking and entering into the plaintiff's fishery, being the fluvial or angling division of the South West Miramichi River, from Price's Bend to its source, and fishing for and catching salmon in the manner known as surface fly-fishing against the will and consent of the plaintiff. The plaintiff claimed the exclusive right of fly-fishing for salmon by virtue of a lease granted to him of this fishery by the Minister of Marine and Fisheries for the Dominion of Canada, for the term of 9 years from 1st January, 1874, under the authority of the Act of Parliament (31 Vict., c. 60), known as the Fisheries Act, and of the 12th subsection of sec. 91 of the B. N. A. Act, 1867.

Neither party claimed any rights as riparian proprietors, the Crown having in the grant of the lands reserved the bed of the river at that part where the alleged acts of trespass had been committed.

The defendants claimed that the part of the stream where the alleged trespass was committed is a public navigable river; navigable for canoes and small boats to pass thereon, although above the ebb and flow of the tide, and that the Parliament of Canada has no right to deprive the public of its common law right of fishery and vest it in a single individual, because, since *Magna Charta*, the right of the subject to go upon waters and fish is as much a *civil* and *private* right as going upon his own land, and that if the stream was not a public navigable river then the bed of the river being reserved to the Crown the exclusive right

of fishery is in the Government of New Brunswick in trust for the people.

The defendants admitted that the Dominion Parliament had the right by appropriate legislation to regulate the fisheries, that is, the time and manner of fishing, but contended that it could not interfere with private property—with the rights of fishing which already existed by law.

The plaintiff contended that by the terms of the B. N. A. Act, sec. 91, ss. 12, Sea Coast and Inland Fisheries (the latter of which must embrace non-tidal rivers) are assigned exclusively to the Federal Parliament, and also that by section 5 of the 3rd schedule "Rivers and Lake Improvements" are declared to be the property of Canada, and that fisheries being given to Canada this necessarily carries with it, as an incident, whatever powers the Federal Parliament may deem it necessary to exercise for the proper management and control of the fisheries, whether by granting lease or otherwise.

The Judgment of the majority of the Court (Allen, C. J., Weldon, and Duff, J. J.,) was delivered by Allen, C. J.

There are numerous other subjects besides the Fisheries over which the exclusive control is given to the Dominion Parliament, and by which either the property or the civil rights, or both, of the people of this Province are affected, such as trade and commerce, navigation and shipping, bankruptcy and insolvency, marriage and divorce; and yet it has never been contended that the Local Legislature would have any power to legislate upon any of these subjects. Indeed this Court has already decided in the case of *Regina v. Chandler*, 1 Han. 548, that the Legislature of this Province has no authority, since the Union, to pass an Act relating to Insolvent Confined Debtors, because it related to insolvency—a matter over which the Dominion Parliament had the exclusive control under "The British North America Act," though it was contended in that case that the Act in question merely affected the civil rights of debtors in respect to their discharge from prison. The effect of that decision is that the Local Legislature has no right to deal with any subject which, even indirectly, relates to a matter over which the Dominion Parliament has the exclusive power of legislation. I cannot distinguish this case, in principle, from *Reg. v. Chandler*.*

*[It is to be remarked here that in the *Queen v. Dow* (1 Fugs 300) it was also intimated by the Court that they would be governed in their decision by the principles they had enunciated in *Regina v. Chandler* in the construction of the B. N. A. Act as to the distribution of the powers between the Federal and Provincial Government: but in that case on appeal to the Privy Council (L. R. 6 P. C. 372) the construction of the majority of the Court was disapproved, and their Lordships expressly approved of the views of Fisher, J., also the dissenting Judge in that case. (See report of *Queen v. Dow*, under sect. 92 ss. 13).]

It was admitted on the argument that the Dominion Parliament had the right to legislate respecting the fisheries in tidal rivers ; and that, so far as related to the time and manner of fishing, they might also regulate the fishery in non-tidal rivers. But, if any effect is to be given to the words of the Act I am unable to draw any such distinction. The term "Inland Fisheries" is peculiarly applicable to a non-tidal river. And might not legislation respecting fishing in a tidal river affect the civil rights of the people of this Province as much, or nearly so, as legislation respecting the fisheries in a non-tidal river ? If it affected them in any degree according to the logical result of the defendants' arguments, the legislation would be *ultra vires*. Suppose the Parliament should pass a law (as, no doubt, it could), declaring that no person should fish in a tidal river without a license, would not that be as much an interference with civil rights as a similar law respecting the fishing in a non-tidal river ? Yet, if it can be done in the one case, why not in the other ? And is it not as much an interference with a man's civil rights to declare that he shall not fish at certain seasons of the year or with a certain description of net or weir or that he shall not spear fish as it is to declare that he shall not fish without a license ? If the Parliament has the right to legislate on the subject of Inland Fisheries at all (and if those words are to be understood in their ordinary and natural sense, it has the right), it must be the judge of the description and extent of legislation that is necessary : The Imperial Parliament has not limited its powers.

I am of opinion, for the reasons stated, that the Fisheries Act is within the power assigned to the Dominion Parliament, and that the Government had authority to grant the lease in question.

FISHER, J., dissenting; said :—This was a special case stated for the opinion of the Supreme Court. After argument it was agreed to denude it of all technical difficulties, and submit the following question for adjudication.

Whether the Government of the Dominion of Canada, under "The British North America Act, 1867," and the Fisheries' Act passed by the Parliament of Canada, had power to grant the license in question. Rivers have been divided into three classes, or rather presented in three aspects. First, when they are altogether private, such as shallow streams ; second, when they are private property, but subject to the public use ; thirdly, when the use and property are in the public. The Miramichi affords an illustration of the three classes. It is entirely private property in one part ; private property, subject to the public use, in another, and altogether public in another. *Hale*, and all the

old writers upon the common law, define a navigable river to be one in which the tide ebbs and flows—a tidal river. In the second class, though the river can be navigated by canoes, boats and rafts, it is not technically a navigable river, but a highway. The property in the river is in the owner of the soil through which it flows, subject to the public easement. A private river is the property of the owner of the soil without any such easement.

This classification and description of the common law of England has been adopted in this country and in most of the States of the American Republic, though there is a great dissimilarity betwixt the rivers of Great Britain and America and in the use to which they are applied. In South Carolina and Pennsylvania this distinction has been recognized and acted upon, so that one principle of law is applied to the Susquehanna, and another, altogether different, to the Hudson and different to the Susquehanna, in the different States through which it flows. In private rivers of both classes the riparian proprietors, as they are called, have the exclusive right of fishing or the several fishery, and alone are entitled to take fish from any part of the stream within their territorial limits. This property in the fish in the river is derived from the ownership of the soil, and an interest in the one is held to be quite as sacred as an interest in the other. It is a part of the freehold of which no man can be disseized "but by the lawful judgment of his peers or by due process of law." While every riparian proprietor has the exclusive right to fish in that part of the river included in his grant, he must so exercise the right as not to injure the other proprietors above or below him on the stream, either by preventing the passage of the fish or by such a mode of catching as will lead to their destruction or injury. Hence the necessity of legislation to secure this object. In tidal or navigable rivers, all the Queen's subjects have the common right to fish.

Previous to the Union of Canada, Nova Scotia and New Brunswick, the Legislatures of the different Provinces enacted laws for the protection and regulation of the fisheries. The public interests demand that so valuable an industry should be fostered and protected, and such legislation was necessary in the interest of the owner of the fishery. To attain this end, each separate Legislature most scrupulously abstained from any interference with the right of property of the riparian proprietors in their fish. Though they were each omnipotent within their own limits, in no one instance that I can discover did they attempt to deal or interfere with the right of the riparian proprietor; simply providing for the protection and growth of the fish.

At the time "The British North America Act, 1867," passed, there were laws in force in the three Confederated Provinces, for the regulation and protection of the fisheries, in each of which the authority to grant any right of fishery was confined to the ungranted portions of the respective Provinces. In this state of things the Union was agreed to, and ratified by a Parliamentary declaration of its terms, and of the constitution of the Legislative authority in the Dominion, which defined the powers of the Parliament and the Legislatures of the respective Provinces. All the powers possessed by the Legislature of New Brunswick still exist as potential as ever, but they are distributed between the Parliament and Local Legislature, and are exercised in each according to the limitations of the constituting Act.

The Legislatures of the different Provinces were empowered to make laws exclusively upon the classes of subjects enumerated in the 16th paragraph of the 92nd section of the Act, amongst which were "Property and Civil Rights in the Provinces."

The Parliament of Canada was empowered to legislate exclusively upon the classes of subjects enumerated in the 29th paragraph of section 91, among which was "Sea Coast and Inland Fisheries." It was also declared that the Parliament should have power to enact laws in relation to "all matters not coming within the classes of subjects assigned exclusively to the Local Legislatures," and to prevent any interference by the Local Legislatures with the exclusive legislative authority of the Parliament in regard to the classes of subjects exclusively assigned to the Parliament, and to avoid all misapprehension and conflict, it was declared that none of the classes of subjects enumerated in the 91st section should come within "the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Local Legislatures and specially stated in the last paragraph of the 92nd section." Now, what is the meaning of the words "Sea Coast and Inland Fisheries" in the 91st section? By the employment of this language, what power of legislation is conferred on the Parliament? Looking at the objects sought to be attained by the Union of the Provinces, and the state of legislation in the different Provinces at the time of the Union, I think it must be inferred that the intention was to confer upon the Parliament the same power that the Legislatures of the different Provinces had been accustomed to exercise; that is, the power to provide for the regulation and protection of the fisheries. Maxwell on the construction of Statutes (p. 18) says: "The true meaning is to be found by considering the cause and necessity of making the Act, by comparing one part with another, and

sometimes by foreign circumstances. In other words, any grounds which justify or require a departure from the literal and obvious meaning and construction of the words, phrases and sentences, are to be sought in the context, read, when necessary, by the light which the history of the enactment may throw upon it." . . . This is a construction consistent with the whole spirit and object of the Act, and will give to each of the powers of legislation the full scope, and limit each to the authority contemplated by the Act. If the authority to legislate upon "Sea Coast and Inland Fisheries" empowered the Parliament to interfere with private rights, and deal with the property in the fish, upon the same principle, by the authority to legislate upon "Navigation and Shipping," it would be enabled to the same extent to deal with the property in the ships of ship-owners. The right in the ship is no higher or more sacred to the ship-owner than the right in the fish to the riparian proprietor.

In conferring upon the Local Legislatures the power to legislate upon property and civil rights, I am of opinion it was the intention that this power should only be trenched upon to the extent required to enable the Parliament to exercise the authority to legislate upon the different subjects assigned to it, and the Parliament, in legislating upon the subjects within its competency, can only so far interfere with property and civil rights as is necessary to work out the legislation upon the particular subjects specially delegated to it. The authority to deal with the fish, the property of individuals, and to appropriate that property is not necessary to the working out of the powers relating to "Sea Coast and Inland Fisheries." Any other construction brings the two classes into conflict. On the other hand, by construing "Sea Coast and Inland Fisheries" as an authority for Parliamentary legislation for the protection and regulation of the fisheries, there is no interference with the rights of property, and each class preserves its power of legislation in its integrity—there is no conflict. This construction of the Act enables both classes to run together, and is consistent with common sense, and no Act of Parliament should be construed contrary to common sense.

It was not the intention of the B. N. A. Act, 1867, to give to the Parliament of Canada any greater power than had been previously exercised by the separate Legislatures of the Provinces; that is, the general powers for the regulation and protection of the fisheries; and the Parliament of Canada appears in the language employed to appreciate their constitutional position and authority, and to have conceived the legislation so as not to interfere with

the right of property. The Act authorizes the issuing of fishery licenses only where the exclusive right of fishing does not already exist. This is substantially what the old law did: wherever the right to the fish had been acquired by an individual there was no authority to lease; when the stream was in the Crown the license could issue. Now, with few exceptions in this Province, the lands through which the fresh water streams flow have been granted and the proprietors own the exclusive right to fish, so that the Act exempts them from its operation. With the exception of the Indian lands and any lands reserved for military purposes, the ungranted lands in the Province are in the Crown for the benefit of the people of New Brunswick, and the exclusive right of fishing is an incident to the property in the soil.

In view of the whole case I am of opinion that neither Act authorises the issuing of a license to fish in the fresh water rivers of this Province.

It was urged that, as rivers were mentioned in the 3rd Schedule of the "B. N. A. Act," as the property of Canada that would give the right. If this were intended it would not even then give the right. The 108th Sec. enacts "that the public works and property of each Province enumerated in the third schedule of the Act shall be the property of Canada."

It is only the "property of each Province,"—and this could only mean the user of the rivers for the purpose of navigation, and not the property in the fish—which was generally owned by private individuals. It is the public property of each Province, and not the property of private individuals therein, which is given to Canada. By reference to the first proposition for Union agreed to at Quebec there will be found "River and Lake Improvements." It has been made plural by some inadvertence in copying.* Its object is obvious enough. While Canada assumed the debts of the different Provinces she received in return the various public works that had been constructed in incurring that debt.

The River St. Lawrence or the Saint John would be rather an extraordinary thing to call a public work, whilst the improvements on the St. John, the St. Lawrence, as well as on the lakes, are really public works, and have been constructed with money that created the debt; Canada assumes the debt, and receives in return the public works and property that it has constructed.

I have therefore arrived at the following conclusions:—That it was not the intention of the British North America Act 1867 to give to the

* The French copy of the Act, in the Dominion Statute of 1868, leaves no doubt on this matter, as the fifth paragraph of the Third Schedule reads:

5. Améliorations sur les lacs et les rivières.

Parliament of Canada any greater power than had been previously exercised by the separate Legislatures of the Provinces; that is, the general power for the regulation and protection of the fisheries.

That the Act of the Parliament of Canada, 31 Vict., c. 60, recognizes that view, and, while it provides for the regulation and protection of the fisheries, it does not interfere with private rights, only authorizing the granting of leases in fresh water rivers, where such rights have not already accrued, and that any lease granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion or in which the soil is not in the Dominion is illegal; that where the exclusive right to fish has been acquired by grant of the land through which such river flows there is no authority given by the Canadian Act to grant a right to fish; and also that the ungranted land being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and in such case is in the Crown as trustee for the people of the Province, and a license to fish in such stream is illegal.

The questions involved in the preceding case (*Robertson v. Steadman*), with another question as to the construction of the grant, were again raised between the same parties and in the same court—but differently composed—*Robertson*, the defendant in the preceding case, having again attempted to fish for salmon with a fly, but from the bank of another part of the stream within the limits of the license given to the same licensee, his rod, reel, and line were forcibly taken from him, and this led to the following action of trespass against the licensee.

Steadman v. Robertson et al. (2 Pugs. & Burbidge, 580): The locality where the alleged trespass was committed was within the grant to the Nova Scotia and New Brunswick Land Co. After the usual granting clauses, the grant concluded with: "also further excepting out of the grant the bed and waters of the Miramichi River," etc.

It was held in this case by the Supreme Court of New Brunswick:—

That the general power of regulating and protecting the fisheries in this Dominion is in the Parliament of Canada, but a license granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal.

That there is no authority given under the Dominion Act 31 Vict., c. 60, to grant a right to fish in fresh water rivers where the exclusive right to fish has been acquired by grant of the land through which such river flows. That when the lands on fresh water rivers have been granted, the exclusive right of fishery is in the riparian owner. It is an incident to the property in the soil, and where the lands have not

been granted (with the exception of the Indian lands and lands owned by the Dominion Government) the right is in the Crown, as trustee, for the benefit of the people of the Province exclusively; and a license by the Dominion Minister of Marine and Fisheries to fish in such stream would be illegal. That in a grant of land to the Nova Scotia and New Brunswick Land Co., which excepts the bed and waters of a fresh water river through which it flows, this exception does not affect their right to the fishery; as the right to the waters, and its incidents does not depend upon and is not affected by, the ownership of the bed of the river but of the *ripa*—the bank.

Fisher, J., in delivering the judgment of the Court, repeated much of his able dissenting opinion and reasoning in the preceding case of *Robertson v. Steadman*, and said:—

If the authority to legislate upon “Sea Coast and Inland Fisheries” empowered the Dominion Parliament to interfere with private rights, and deal with the property in the fish, upon the same principle by the authority to legislate upon “Navigation and Shipping,” it would be enabled to the same extent to deal with the property in the ships of ship-owners. The right in the ship is no higher or more sacred for the ship-owner, than the right in the fish for the riparian proprietor.

Fisher J.; cited *Chasemore & Richards*, (7 H. L. Cases, 382). *Lyon v. Fishmongers Company* (L. R., Appl. Cases, 673.)

In *McCready v. Virginia* (94 U. S., S. C., p. 394), where the precise question to be determined was whether the State of Virginia could prohibit the citizens of other States from planting oysters in a river in that State where the tide ebbed and flowed,

Mr. Chief Justice Waite, in delivering the opinion of the Court, said:—

The principle has long been settled in this Court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running, and for this purpose the State represents its people.

In *Smith v. State of Maryland* (18 How. 71), Held:—

That the soil below low water mark in a Bay (the Chesapeake) within the boundaries of a State, belongs to the State. That this soil is held by the State not only subject to, but in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, shell fish, as well as other fish.

That the State has a right to protect this fishery by making it unlawful to take or catch oysters with a scoop or drag, and to inflict

the penalty of forfeiture upon the vessel engaged in so doing ; that such a law is not repugnant to the Constitution of the United States, although the vessel which is forfeited is enrolled and licensed for the coasting trade under an Act of Congress.

In *Malcolm v. O'Dea* (10 H. L. Cases, 593) :

Held, by their Lordships, that the soil of navigable rivers so far as the tide flows and re-flows is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta, the Crown could, by its prerogative, exclude the public from such *prima facie* right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil.

In *Morin v. Lefèvre et al.* (1 Rev. de Lég. 354) :

Jugé, que pour maintenir une action en complainte pour voies de faits sur une pêcherie sur les grèves du St. Laurent, il est nécessaire de faire preuve de possession par titre provenant de la Couronne.

In *Stoughton v. Baker* (4 Mass. 522), Held :

That, where the public have a right to have a convenient passage-way for fish to ascend the river, every owner of a mill dam, holds it on the condition or under the limitation that a sufficient and reasonable passage-way shall be allowed for the fish. That, this limitation being for the benefit of the public was not extinguished by any inattention or neglect in compelling the owner of a mill dam to comply with it.

In *Carter v. Murcot* (4 Burr. 2162) Lord Mansfield held :

That " in rivers *not navigable*, the proprietors of the land have the right of fishery on their respective sides : and it generally extends *ad filum medium aquæ*. But in *navigable* rivers the proprietors of the land on each side have it not ; the fishery is common ; it is *prima facie* in the king, and is public." If any one claims it exclusively, he must show a right. If he can show a right by prescription he may then exercise an exclusive right, though the presumption is against him, unless he can *prove* such a prescriptive right.

Gage v. Bates (7 U. C., C. P., 116-1858).

This action was brought to try the right to an inlet on Burlington Bay—plaintiff claimed by Patent of 19th March, 1798—Held, that the inlet was part of the Bay, and that the *locus in quo* being navigable waters, if the Crown could grant it at all, the public had nevertheless the right to use it, and fish in it.

Dixon et al. v. Snetsinger (23 U. C., C. P., 235), Held :

That the River St. Lawrence above tide water is a navigable river,

the bed of which is vested in the Crown, and therefore, that under a grant of lots described as bounded by the water's edge, no part of the bed of the river passed to the grantee.

In *Moffat v. Roddy*, M. T., 2 Vict.:

The Crown cannot grant an exclusive right of Fishery in navigable waters. (Robinson & Joseph's Ontario Digest, Vo. Fishery.)

14. Currency and Coinage.

Story, in commenting on the provision of the U. S. Constitution (Art. 1, sec. 8, ss. 5) which confers the exclusive power on the General Government "to coin money, regulate the value thereof and of foreign coin," says (Comm. U. S. Const. sec. 1113):

The object of the power is to produce uniformity of value throughout the Union, and thus preclude its citizens from the embarrassments of a perpetually fluctuating and variable currency.

Blackstone says (1 Comm. 276): "The power to coin money is one of the exclusive prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin of a known value in the home market. As money is the medium of Commerce it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current, that its value may be known on inspection. It was by special statute made High Treason to counterfeit the king's money as being a crime against the Supreme Executive power for, if every individual were permitted to make and circulate what coin he should please, there would be an opening to the grossest frauds and impositions on the public."

15. Banking, Incorporation of Banks, and the issue of Paper Money.

If Banking Corporations or private bankers might issue and circulate notes, bills of credit, or paper certificates of any kind, as money, the exclusive power conferred upon the Federal Government over the currency would be wholly ineffectual.

Macauley (Hist. of Eng., c. 20) gives the following account of the establishment of the Bank of England:

Before the end of the reign of Charles the Second, a new mode of paying and receiving money had come into fashion among the merchants of the capital. A class of agents arose whose office was to keep the cash of the commercial houses. This new branch of business naturally fell into the hands of the goldsmiths, who were accustomed to traffic largely in the precious metals, and who had vaults in which great masses of bul-

lion could be secured from fire and from robbers. It was at the shops of the goldsmiths of Lombard street that all the payments in coin were made. Other traders gave and received nothing but paper. . . .

Two clerks, seated in one counting house, did what, under the old system, must have been done by twenty clerks in twenty different establishments. A goldsmith's note might be transferred ten times in a morning; and thus a hundred guineas locked in his safe close to the Exchange did what would formerly have required a thousand guineas, dispersed through many tills, some on Ludgate Hill, some in Austin Friars, and some in Power street.

Gradually even those who had been loudest in murmuring against the innovation gave way, and conformed to the prevailing usage. . . .

The advantages of the modern system were felt every hour of every day in every part of London; and the people were no more disposed to relinquish those advantages for fear of calamities which occurred at long intervals than to refrain from building houses for fear of fires, or from building ships for fear of hurricanes. . . .

No sooner had banking become a separate and important trade, than men began to discuss with earnestness the question whether it would be expedient to erect a national bank. The general opinion seems to have been decidedly in favor of a national bank, nor can we wonder at this: for few were then aware that trade is in general carried on to much more advantage by individuals than by great societies; and banking really is one of those few trades which can be carried on to as much advantage by a great society as by an individual. Two public banks had long been renowned throughout Europe, the Bank of St. George at Genoa, and the Bank of Amsterdam. The immense wealth which was in the keeping of those establishments, the confidence which they inspired, the prosperity which they had created, their stability—tried by panics, by wars, by revolutions, and found proof against all—were favorite topics.

After the revolution, a crowd of plans, some of which resemble the fancies of a child or the dreams of a man in a fever, were pressed on the Government.

In 1691 William Paterson, an ingenious, though not always a judicious, speculator submitted to the Government a plan of a national bank; and his plan was favorably received both by statesmen and by merchants.

The plan was that twelve hundred thousand pounds should be borrowed by the Government on what was then considered as the moderate interest of ten per cent. In order to induce capitalists to advance

the money promptly on terms so favorable to the public, the subscribers were to be incorporated by the name of "The Governor and Company of the Bank of England." The Corporation was to have no exclusive privilege, and was to be restricted from trading in any thing but bills of exchange, bullion, and forfeited pledges.

Upon this basis a Bill (5 W. & M. c. 20) was accordingly passed.

. . . A clause was most properly inserted which inhibited the Bank from advancing money to the Crown without authority from Parliament. Every infraction of this salutary rule was to be punished by forfeiture of three times the sum advanced; and it was provided that the king should not have power to remit any part of the penalty.

And thus a Bill which purported only to impose a new duty on tonnage for the security and benefit of such persons as should advance money towards carrying on a war, was really a bill creating the greatest commercial institution that the world has ever seen.

17. Weights and Measures.

Story on the provision of the U. S. Constitution (Art. 1, sec. 8, ss. 5) giving power to the U. S. General Government to "fix the standard of weights and measures," says (Com. Cons. sect. 1117):

"In England the power is said by Mr. Justice Blackstone to belong to the royal prerogative; but it has been remarked by a learned commentator on his work that the power cannot with propriety be referred to the king's prerogative, for, from Magna Charta to the present time, there are above twenty Acts of Parliament to fix and establish the standard and uniformity of weights and measures."

Blackstone (1 Comm. 273) says:

"The regulation of weights and measures for the advantage of the public ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure, are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard, and it is necessary to have recourse to some visible, palpable, material standard.

19. Interest.

Mr. Sergeant Stephen remarks, (2 Comm. p. 94):

That the gradual relaxation of the laws against usury was due to the diffusion of new opinions with respect to the policy on which the former system was founded. Its defence had in modern times always

rested on the apparent necessity of protecting the needy and improvident from extortion—an abuse manifestly more incident to a bargain for the loan of money than to any other description of contract; and, though the difficulty of putting an entire stop to the mischief was unquestionable, this was deemed no reason for abstaining from all attempts to check its career.

On the other hand, it was insisted that the laws against usury were so ineffectual to deter men from advancing money on illegal interest and, when not actually violated, were so easily capable of being evaded, as not to be worthy of retention.

It was said, moreover, that they tended to promote the very evil which they were designed to repress; inasmuch as persons who, in defiance of the law, engaged in advances of this description, found it necessary to compensate themselves for the legal peril, by insisting on a more exorbitant return for their money.

And it was further maintained that these laws imposed an inconvenient and impolitic restraint upon the price of money, which ought, like other commodities, to be allowed to find its own level in the market.

Under the influence of these views, the total abandonment of the former policy was at length resolved upon by the Legislature.

The "Bystander," 1880, p. 238, says:

Laws limiting the rate of interest are absurd. Their effect would be to prohibit any one who had not the best security to offer from borrowing at all, even in his utmost need. Practically, such persons would pay a most exorbitant rate, because the lender would have to protect himself against the risk of illegality, as well as that of bad security.

In *Ross et al. v. The City of Montreal* (2 L. N., p. 187), Superior Court, May, 1879:

The Legislature of the Province of Quebec, by 41 Vict., c. 27, authorised the Corporation of the City of Montreal, by a by-law, to exact an increase, addition or penalty on all arrears of assessment not paid within a certain delay.

Held, that the claim by the Corporation of a ten per cent. increase on overdue assessments is, in effect, a claim to charge interest at ten per cent.

And that the Local Legislature, since the B.N.A. Act, has no power to legislate upon the subject of interest.

Johnson, J., in rendering judgment said: By whatever name they call the exaction in question, it is, by law, still interest, and nothing else; they cannot change its nature by changing its name.

20. Legal Tender.

The exclusive power given to the Federal Government to authorise the tender of coined or paper money in payment of debts is founded upon the same general policy, which confided to the general Government the regulation of trade and commerce (ss. 2) and all legislation as to currency and coinage (ss. 14) and the issue of paper money, (ss. 15.)

The policy is to provide and establish a fixed and uniform standard of value for money throughout the Dominion, by which commercial and other dealings of the citizens, as well as all monied transactions, might be regulated, and a solid foundation laid for the formation and discharge of contracts and of the obligations created thereby. (See Story, Comm. Cons., sec. 1366).

In *Woodruff v. Trapnall*, (10 How. 190) it was held by the U.S. Supreme Court:

That a provision of the charter of the Bank of the State of Arkansas, to the effect that the bills of the Bank "shall be received in all payments of debts due to the State of Arkansas," constituted a continuing contract between the State and the bill-holders which ran with the bills; and an Act repealing this provision was held to be invalid as to previously issued bills, and a tender to the State of such bills in payment of an indebtedness to the State was held to be a valid tender, although the bills came into the possession of the tenderer after the passage of the repealing Act."

Similar decisions in *Furman v. Nicholl*, 8 Wall 44, and *State v. Stoll*, 17 Wall 425.

Phillimore remarks, (International Law, 4 vol., p. 620) :

It is a maxim of universal jurisprudence that if the obligee or creditor refuse to receive his due when tendered to him the debtor or obligor is not to suffer by his caprice . . . and if a tender by the debtor with refusal to receive by the creditor operates as a discharge by the *lex loci contractus* it will be respected as a valid discharge everywhere.

Todd, (Col. Gov. in Col., p. 151), informs us that :

Owing to serious financial embarrassments in the Colony of Queensland, ministers had tendered to the Governor their advice that, in order to sustain the public credit, there should be an immediate issue of inconvertible paper currency in the shape of Legal Tender notes to an amount not exceeding two hundred thousand pounds.

The Governor, on Imperial considerations, refused to give the Royal assent to the Bill. On the resignation of the Ministry, the emergency was met by a new Ministry, by the introduction of a Bill authorizing

the issue of treasury bills to the amount of three hundred thousand pounds. This Bill received the assent of the Governor, the Colonial Secretary, Lord Carnarvon, expressing his entire approval of the Governor's conduct.

21. Bankruptcy and Insolvency.

In the exercise of the powers conferred by this sub-section the Dominion Parliament passed the Insolvent Act of 1869, which superseded the Insolvent Act of 1864 of the Province of Canada, and all such legislation as existed in the several Provinces anterior to the B. N. A. Act, 1867; and in 1875 it replaced the Act of 1869, by 38 Vict., ch. 16, which was amended several times and at last totally repealed in the session of 1880.

Mr. Sergeant Stephen, remarks upon the law of Bankruptcy in England (2 Com. p. 145) :

"The foundation of the law of bankruptcy in this country is a Statute of 34 and 35 Henry VIII., c. 4, which was pointed at persons who should, in the language of that day, '*make bankrupt*,' and it more particularly described them as those 'who obtain other men's goods and then suddenly flee to parts unknown or keep their houses, and there consume their substance without paying their debts,' and it proceeded to direct that, upon every complaint in writing made to the Lord Chancellor or other dignitaries therein mentioned, the bodies of the offenders, and their lands, goods and chattels, should be ordered by their wisdom and discretion for payment of all the creditors rateably according to the quantity of their debts. The jurisdiction created by this Statute for correction of the abuses which it describes was one unknown to the common law; and it was soon afterwards followed by another Statute in further development of the new system. . . .

So far everything was in favor of the creditor, for the bankrupt being in those days considered as a criminal, could naturally expect no favor at the hands of the Legislature; but at length it appeared harsh to strip a man of all his resources without relieving him at the same time from his difficulties, and by 4 Anne, c. 17, it was consequently provided, in imitation probably of the Roman law of cession, that a bankrupt trader, who had thus been compelled to surrender the whole of his effects, and had in all matters conformed to the law of bankruptcy, should be entitled to his discharge from all further liability for the debts theretofore contracted."

Story in his Commentaries (section 1100) on a similar clause in the U. S. Constitution, giving to the Federal Government the power to establish "uniform laws on the subject of Bankruptcies" (Art. 1, sec. 8, ss. 4), quotes from the "Federalist" as follows :

The power of establishing uniform laws of bankruptcy is so intimately connected with the Regulation of Commerce, and will prevent so many frauds, where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn in question.

The general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtors *pro tanto* to the discharge of their debts, whenever the latter are unable to discharge the whole amount; and on the other hand, to relieve importunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolize all their future earnings.

Imprisonment, as a civil remedy, admits of no defence, except as it is used to coerce fraudulent debtors to yield up their present property to their creditors.

One of the first duties of legislation, while it provides amply for the sacred obligation of contracts and the remedies to enforce them, certainly is, *pari passu*, to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labor, and the benefits of his paternal superintendence.

In *Regina v. Chandler* (1 Hannay 548), Held, by the Supreme Court of New Brunswick :—

That an Act of Legislature of the Province of New Brunswick, in reference to “Insolvent Confined Debtors,” passed in 1868, which provides for the examination of a debtor before a Judge as to his ability to pay his debts, and for his discharge from gaol, or the limits as to the suit for which he was confined, where his inability to pay is shown, and where he has made no fraudulent transfer or undue preference, is *ultra vires* as legislating upon the subject of insolvency, a subject exclusively assigned to the Parliament of Canada by the B. N. A. Act of 1867, sec. 91, sub-section 21.

In *The Queen v. Dow et al.* (1 Pugs. 300, reported under sect. 92, ss. 13) :

The Supreme Court of New Brunswick intimated that it should be governed in deciding that case by the principle of construction it had enunciated in the interpretation of the B. N. A. Act, in *Regina v. Chandler*, but on Appeal, *Queen v. Dow et al.*, was reversed by the Privy Council (L. R. 6, P. C. 272) and the principle of construction enun-
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ated in that case by the Supreme Court of New Brunswick was disapproved.

In *Côté v. Watson* (3 Q. L. R. 157, C. S.) Plamondon, J., Jugé que :

En imposant un droit par l'Acte des Licenses de Québec, 1870, sur le produit de la vente des biens d'un failli faite en vertu de l'Acte de Faillite, 1869, et en restreignant les pouvoirs des syndics dans la mise en opération de cette loi, la Législature de la Province de Québec a agi *ultra vires* ; elle a usurpé une juridiction en dehors des pouvoirs spéciaux qui lui sont conférés par l'Acte de l'Amérique Britannique du Nord.

In *Re Huffman, an Insolvent* (5 Can. L. J., N. S. 71), 1869, Sherwood, Co. Judge, said :—

The Insolvent Act of the late Province of Canada required that all notices under that Statute should be published in the Canada Gazette. . .

If the Act is to be construed literally, it interferes directly with the Statute of Canada respecting insolvency which is now in force in Ontario, and deals with a subject which the Imperial Legislature has placed exclusively under the Parliament of Canada. It appears, however, to me, on full consideration of the subject, that the Act of Ontario was only intended to apply to notices that were connected with matters over which it had control, either exclusively or jointly, with the Legislature of Canada, and not to those within the authority of the last mentioned Legislature.

The Act of the late Province should, I think, govern as to notices in Bankruptcy.

In *McAlinon v. Pine* (2 Pugs. 44), Held :

That an Act of the Province of New Brunswick passed since Confederation, extending to a whole county the gaol limits established before Confederation, for any person in the custody of the Sheriff under civil process, did not when applied to an insolvent so relate to Insolvency as to be *ultra vires* of the Local Legislature.

In *Armstrong v. McCutchin* (2 Pugsley 383, S. C. of N.B.), Ritchie, C. J., remarked that :

By the Imperial Act, legislation on bankruptcy and insolvency is confined exclusively to the Dominion Parliament ; and in like manner legislation on " civil rights " and procedure in civil suits belongs to the Local Legislature. Legislation on bankruptcy and insolvency necessarily involves an interference to a certain extent with " civil rights "

and "procedure in civil suits," and so far as such is necessary for, and incident to, legislation on bankruptcy and insolvency it is within the power of the Dominion Parliament to deal with these subjects; and when the Local Legislature deals directly with bankruptcy or insolvency, or the legislation of the Dominion Parliament and the local legislation conflict, so much of the legislation of the Local Legislature as so deals or interferes, or is in conflict with, the legislation of the Dominion Parliament, is *ultra vires*.

In *Re ex parte Killam* (14 Can. L. J., N.S. 242), Savary, Co. Judge, held:

The Dominion Parliament in legislating on bankruptcy and insolvency, may, in carrying out its policy on these subjects, override any local enactments, and assert its paramount authority throughout the whole field of the law of property and civil rights.

In *Perley et al. v. Burpee* (Sunbury Election Petition), Duff, J., said:

In my opinion, Parliament had ample power to prescribe the procedure in Bankruptcy and Insolvency; its legislation with regard to Insolvency is not inconsistent with the authority of the Provincial Legislatures under sub-section 14 of sect. 92. Bankruptcy is a system of law which has been known in England for between two and three centuries; and which was once introduced into this Province, under a Provincial Act, previous to the Union. It is a system which provides for the distribution of the debtor's property amongst his creditors in a mode specially directed by Statute and unknown to the Common Law. In some respects its policy is opposed to that of the Common Law; in this especially, that it takes from the judgment creditor the preference that the Common Law accorded to him as the reward of his vigilance. It involves a procedure peculiar to itself, without which it cannot be worked out.

Bankruptcy and Insolvency are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. They describe in their known legal sense, provisions made by law for the administration of the estate of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions and the manner in which that law is to be brought into operation, and the effect of its operation.

Bankruptcy thus has acquired a legal technical meaning. *Ex vi termini* it imports the necessary procedure for the administration of the estate of the insolvent; the prescribing of the conditions and rules

under which it shall be brought into operation, and the manner of bringing it into operation.

Bankruptcy and Insolvency are comprised in class 21, of section 91; and therefore, according to the concluding words of that section, they shall not be deemed to come within class 14, sub-section 92.

In *Cushing v. Dupuy* (42 L. T., N. S. 445), Held, by their Lordships of the Privy Council:

That it is a necessary implication that the Imperial Statute in assigning to the Dominion Parliament the subjects of Bankruptcy and Insolvency, intended to confer upon it, legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them.

L'Union St. Jacques de Montréal v. Blisle, 1874 (L. R. 6 P. C. 31).

This was an appeal to the Privy Council from the Q. B., Montreal.

The majority of Judges in the Court below, Duval, C.J., Drummond and Monk, J.J. (Caron and Badgley, J.J., dissenting) considered that the Provincial Legislature in passing the Provincial Act had legislated on a matter coming within the class of "insolvency," and which belonged under the 91st section of the Imperial Act to the exclusive authority of the Parliament of Canada.

Held, by their Lordships of the Privy Council:

That the Act of the Provincial Legislature of Quebec (33 Vict., c. 58), which purported to deal solely with the affairs of a particular Society in the Province, and by legislation relieve them from a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

That the Provincial Act related expressly to a matter "of a merely local or private nature in the Province," which, by the 92nd section, sub-sec. 16, of the B. N. A. Act of 1867, is assigned to the exclusive competency of the Provincial Legislature.

That the competency of the Provincial Legislature over this matter is not qualified by reason of its coming within class 21 "of Bankruptcy and Insolvency," one of the classes of subjects specially enumerated in sec. 91 as being under the exclusive authority of the Parliament of Canada.

Their Lordships observed, that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation. . . . No such general law covering this

particular association is alleged ever to have been passed by the Dominion, . . . and to suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

Upon the same principle by article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "Militia, Military and Naval Service and Defence," any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that, because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land, and, therefore, over all the land in the Province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature: that, their Lordships think, is neither a necessary or reasonable, nor a just and proper construction.

Lord Selborne in delivering the judgment of their Lordships, said: "The fact that this particular society appears upon the face of the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And, in point of fact, the whole tendency of the Act is to keep it out of that category, and not to bring it into it . . . their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency.

In *Sturges v. Crowninshield* (4 Wheat. 123), Held:

That a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution, Art 1, s. 10, and provided that there be no Act of Congress in force to establish a uniform system of bankruptcy conflicting with such law.

In *Damon's Appeal, Supreme Judicial Court of Maine*, it was decided:

That the Constitution of the United States does not prohibit the enactment of an insolvent law by a State.

That the Insolvent Act of Maine having been enacted while the federal bankrupt law was in force, went into full operation upon repeal of the bankrupt law, and not before.

That a statute may be passed to go into effect at a future date, and it is immaterial whether the suspension of its operation be by its own express provision or by virtue of some paramount law, as, *e. g.*, the existence of an Act of Congress on the same subject.

That the provision of Stat. 1878, c. 74, sect. 15, authorizing the sequestration of the estate of an insolvent without previous notice to him, is not unconstitutional for that cause.

On December 9th, 1878, the judge of the Court of Insolvency, on application of the creditors of the appellant, issued a warrant for taking possession of the Appellant's estate, in accordance with the provisions of Stat. 1878, c. 74, §§ 14, 15.

On return-day, Damon filed a motion alleging, in substance, that he was adjudged an insolvent on December 9th, 1878, on the petition of his creditors, and without any notice to himself, contrary to the law of the land; that the statute under which he was so adjudged is unconstitutional and void, for that, when said statute was enacted, to wit, February 21st, 1878, the federal bankrupt law was in force, and so continued until September 1st, 1878; that the state statute did not take effect upon its passage, or at the expiration of thirty days after the recess of the Legislature which enacted it, by reason of the federal bankrupt law; and that the state statute never became of effect. The prayer of the motion was for a dismissal of the proceedings against him.

The judge of the Court of Insolvency overruled the motion; and Damon appealed to the Supreme Judicial Court.

The appellant cited 1 Kent Com. 387; *Houston v. Moore*, 5 Wheat 21; Rev. Stat., c. 1, sect. 3; Const. Maine, art. 1, sects. 1, 9; U. S. Const. 7th Amend., 14th Amend.; *Barron v. Mayor Baltimore*, 7 Pet. 243; *Taylor v. Porter*, 4 Hill. 140.

The opinion of the Court was delivered by

APPLETON, C.J.—The insolvent law of this state, c. 74 of the Acts of 1878, was enacted while the bankrupt law of the United States was in full operation. The proceedings in the case before us are under the insolvent law of this state, and were commenced since the repeal of the bankrupt law.

I. It is objected that the statute of this state is unconstitutional and void, because enacted while the bankrupt Act of the United States was in full force.

It is provided by sect. 8 of the first article of the Constitution of the United States that "Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the

United States." Here is no prohibition against the passage of bankrupt or insolvent laws by the states. As long as the National Government abstains from legislation on this subject the states may act. "It is sufficient to say," observes Marshall, C.J., in *Sturges v. Crowninshield*, 4 Wheat. 122, "that until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the Constitution of the United States." The right of the states to pass insolvent or bankrupt laws, and that the power given to the United States is not exclusive, has been repeatedly affirmed: *Boyle v. Zacharie*, 6 Pet. 348; *Cook v. Moffat*, 5 How. 310; *Baldwin v. Hale*, 1 Wall. 223.

If there is a state law on the subject, the subsequent passage of a Bankrupt law by Congress neither repeals nor annuls it. It only suspends its operation so far as the law of the State may be in conflict with the Act of Congress. As was said by Bartol, C.J., in *Lavender v. Gosnell*, 43 Md. 153, "the Act of Congress suspends the state law but does not repeal it. Proceedings commenced under the state law prior to the passage of the Bankrupt Act may be carried on to their final termination in accordance with the provisions of the state law:" *Judd v. Ives*, 4 Metc. 401; *Chamberlain v. Perkins*, 51 N. H. 337.

In Iowa it was held that the state Insolvent law was not nullified, superseded or suspended by the Bankruptcy law, and that jurisdiction might be exercised under the former until proceedings had been commenced under the Act of Congress: *Reed v. Taylor*, 32 Iowa 209. But it is not required to go to the length of the case last referred to.

While the bankrupt law is in full force, it has, or may have, jurisdiction of cases within its provisions. "Upon the repeal of that law," observes Dewey, J., in *Atkins v. Spear*, 8 Met. 491, "the Insolvent law of Massachusetts was revived, and with its revival all the limitations and restrictions upon the right to a discharge revived, although the acts occurred during its suspension." The bankrupt law merely suspending the state Insolvent laws, upon its repeal they at once revive and need not be re-enacted: *Lavender v. Gosnell*, *supra*. "If the right of the States to pass a bankrupt law is not taken away by the mere grant of the power to Congress," observes Marshall, C. J., in *Sturges v. Crowninshield*, *supra*, "it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States; but it removes a disability to its exercise, which was created by the Act of Congress."

We now come to the question whether the State can pass an Insolvent or Bankrupt law during the existence of an Act of Congress on the subject. In other words, whether the Act under discussion is in force. Its validity is unquestioned unless absolutely void in its inception.

No constitutional provision has been violated; for the passage of such a law is not merely not prohibited, but it is impliedly sanctioned by the clause giving Congress power over the subject-matter of Bankruptcies. The Legislature may pass a law to take effect instantly, or at a future day, or on the happening of a future event. If the statute had said that it was to take effect upon and after the repeal of the bankrupt law of Congress, there could have been no doubt as to its validity. But such is the precise effect of the law without the insertion of any such provision. The Act of Congress is the paramount law on the subject when called into action. The law of the State is subordinate to it. The efficient action of the State law is suspended for the time being precisely as in the cases already considered, when a national bankrupt law was passed subsequently to a State law on the same subject. The State may pass a law which is subordinate to the paramount authority of national legislation, and is only subordinate to that, but which, when that ceases to have force by reason of its repeal, has at once the vigor of law. Whether the law of the State is existent and superseded by the subsequent legislation of Congress, or is inoperative by reason of precedent congressional action, can make no difference. In either case the efficiency of the State law is alike suspended and in abeyance while the Act of Congress is in force, and when that is repealed the law of the State at once and instantly becomes operative, and action may be had under its provisions.

II. It is urged that the law was invalid because it did not go into complete operation after its passage. But that is not requisite to its validity. It does go into partial operation on its passage. It was a law valid in all respects, and to be obeyed, except so far as it was in conflict with the statute of the United States. When that conflict ceased, the law went into full operation. It was a law to go into full effect when it ceased to be in conflict with the Act of Congress, and whether that was inserted in the Act, or left as the legal result from the relation of the State and National Government to each other, can make no difference.

Judgment affirmed. 19 American Law Register N. S. 367.

In Re Henley & Co., (26 W. R. 885; 39 L. J. N. S. 53), Held:

That the Crown is not bound by any Statute, unless expressly named in it; and that, although the Crown gave its assent to the Imperial Bankruptcy Act which declares that the assets of the bankrupt are to be distributed among the creditors *par passu*, the Crown still retains its priority over other creditors as to taxes due to the Crown.

22. Patents of Invention and Discovery.

Story remarks (Comm. Sec. 1147) on the analogous power of legislation conferred by the U. S. Constitution on the U. S. Federal Government, that:

The only boon which could be offered to inventors to disclose the secrets of their discoveries would be the exclusive right and profit of using them as a monopoly, for a limited period. It was beneficial to all parties that the National Government should possess this power.

The right to useful inventions seems to belong to the inventors as a common law right.

Dixon v. London Small Arms Company (1 L. R. App. Cases 632; 25 W. R. 142), Held, by the House of Lords:

That the Crown has the right to the use of a patented process or invention without compensation to the patentee.

That this right of the Crown is not because the Crown is impliedly excepted from the effect of the Letters Patent, but because the privilege thereby granted is granted against the subjects only, and not against the Crown. But, held, that in this case the contract being a contract of sale by the defendants to the Crown and not a contract of agency, the defendants cannot, not being agents or servants of the Crown, set up the immunity which the Crown enjoys, and were liable in an action by the plaintiff (as assignee of the patent) for an infringement.

In *Feathers v. The Queen* (12 L. J. N. S., 114) held:

That an ordinary grant of Letters Patent to a subject, for an invention does not exclude the Crown from using the invention without the license of the Patentee.

That the Crown is not responsible for an infringement of a patent by the Lords of the Admiralty; the remedy is, by action against the wrong-doers.

23. Copyrights.

Hallam, in his introduction to the *Literature of Europe*, says (vol. 1, p. 346), that the earliest instance of protection afforded to a copyright for printing books was in 1469 by the Senate of Venice.

A copyright was admitted to be a common law right and further secured by the Statute of 8 Anne, c. 19. By 5 and 6 Vict. Imp. it was enacted that copyright shall be deemed personal property.

But the subject of copyrights is now mainly regulated by the Imperial Copyright Act of 1842 (5 and 6 Vict., c. 45), which repealed 8 Anne, c. 19—41 Geo. 3, c. 107, and 51 Geo. 3, c. 156 (2 Stephen's Com. p. 41).

By 5 and 6 Wm. 4, c. 65, it is extended to *oral lectures*. Also by decisions of the Courts, *Dramatic Pieces* and *Musical Performances* are protected by the construction given to the Copyright Act of 1842, also extended by special statutes to *engravings* and *prints* and *sculptures*, *models* and *cists*, *designs for articles whether of ornament or utility*, and *paintings*, *drawings* and *photographs*.

Also protection by Statute under certain conditions are afforded to literary and other productions though first published in a foreign country.

The Imperial Statute, 38 and 39 Vict., c. 53, gives legislative effect to the Dominion Copyright Act, 38 Vict., c. 88.

In *Low v. Routledge* (10 Jur. N. S., 922), Kindersley, V. C., said:

Every Copyright Act has for its end and object the encouragement of learning, and professes to encourage learning by holding out to men of learning and genius some advantage to arise from the composition and publication of their works; and the sort of consideration professed is this: to give the author so composing and publishing his work a monopoly, limited in point of duration, but still, in fact, a monopoly.

It is in the nature of a bargain between the public and an author, that is, the composer of a work. The public, although feeling that a monopoly is, *per se*, an evil, considers that that evil is more than compensated for, by the inducement held out to men of learning and genius to produce works which may be useful for the encouragement of learning, and the promotion of literature and science.

In *Smiles v. Belford et al.* (1 Ont. Ap., p. 436), 1877, held by a unanimous Court (affirming the Judgment of Proudfoot V. C., 23 Gr. Ch., p. 590):

That the Imperial Parliament did not, by the British North America Act of 1867 (Section 91), divest themselves of all power respecting British Copyright in Canada. There is nothing in that Act indicating any intention of the Imperial Parliament to abdicate its power of legislating on matters of this kind.

That, under the B. N. A. Act of 1867 (section 91, sub-sec. 23), no greater powers were conferred upon the Parliament of the Dominion to deal with the subject than had been previously enjoyed by the Local Legislatures.

Burton, J.A., In delivering the judgment of the Court, said:

"It is clear, I think, that all that the Imperial Act intended to

effect was to place the right of dealing with Colonial Copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy, and insolvency, and other specified subjects, from the Local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion."

In *Adamson v. Clementson* (L. R. 12, Ch. D. 714), Held :

That an engraving from a publicly sold photograph of an eminent person, for the purpose of being copied on earthenware plates, is not a new and original design, capable of protection under the Copyright of Designs Act.

It is now settled law both in England and the United States, that letters may be protected by copyright in favor of the writer. *Pope v. Curl*, 2 Atk. 342. *Thompson v. Stanhope*, Ambler 737. 2 Story Equity, pp. 944, 211.

25. Naturalization and Aliens.

Story (Com. on Const. sect. 1098) on the power conferred by the Constitution on the Federal Government "to establish an uniform rule of naturalization." (Art. 1, sec. 8, ss. 4), says :

The propriety of confiding the power to establish an uniform rule of naturalization to the national government seems not to have occasioned any doubt or controversy in the convention. . . . It is of the deepest interest to the whole Union to know who are entitled to enjoy the rights of citizens in each state, since they thereby, in effect, become entitled to the rights of citizens in all the States. If aliens might be admitted indiscriminately to enjoy all the rights of citizens at the will of a single State, the Union might itself be endangered by an influx of foreigners, hostile to its institutions, ignorant of its powers, and incapable of a due estimate of its privileges. It follows, from the very nature of the power, that, to be useful, it must be exclusive.

Mr. Sergeant Stephen remarks (2 Comm., pp. 399-405) :

Allegiance is the tie or ligament which binds the subject to the Sovereign, in return for that protection which the Sovereign affords the subject.

The oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honour ;

and not to know or hear of any ill or damage intended him without defending him therefrom.” . . .

But, besides this express engagement, the law also holds that there is an implied original and virtual allegiance owing from every subject to his Sovereign, antecedently to any express promise. . . .

The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason ; but it does not increase the obligation to loyalty. (1 Hale P. C. 67).

Allegiance, both express and implied is, however, distinguished by the law into two sorts or species, the one *natural*, the other *local*.

Natural allegiance is such as is due from natural-born subjects.

Local allegiance, on the other hand, is such as is due from an alien, or stranger-born, for so long a time as he continues within the king's Dominion and protection, and it ceases the instant such stranger transfers himself from this kingdom to another.

Natural allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As, therefore, the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such residence, and, in point of locality, to the Dominions of the British Empire.

The doctrine, however, of the perpetual character of natural allegiance must, under the existing law, be taken with some qualification, for, by the Naturalization Acts of 1870 and 1872 (33 & 34 Vict., c. 14, and 35 & 36 Vict., c. 39) it has been now provided that any British subject who when in any foreign state, and not under any disability, shall have voluntarily become naturalized in such state, shall thenceforth be deemed to have ceased to be a British subject, and be regarded as an alien ; though provision is at the same time made to enable such a person, on the same condition as other aliens, to obtain from the Secretary of State a certificate of re-admission to British nationality which will re-admit him to the status of a British subject.

The Acts also provide that “any person who, by reason of having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became, under the law

of any foreign state, a subject of such state," or who is born out of Her Majesty's dominions of a father being a British subject—may make a declaration of alienage, and shall thenceforth "cease to be a British subject."

The natural-born subject of one prince to whom he owes allegiance may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters. In certain cases he may forfeit his rights as a British subject by adhering to a foreign power, but he remains always liable to his duties: and if, in the course of such employment, he violates the laws of his native country, he will be exposed to punishment when he comes within reach of her tribunals.

All persons found within the territories and possessions of the Crown fall within the operation of the laws of England, though in different degrees: British subjects (that is, persons born within any part of the dominions of the Crown, and in some cases their descendants also, though born in foreign parts, and persons naturalized by Act of Parliament), being in a full and absolute sense entitled to the rights conferred by these laws, and liable to the obligation they impose, but aliens in a limited sense only.

Mr. Sergeant Stephen (2 Comm. p. 404) lays it down as established law in England, that if an alien seeking the protection of the Crown, and having a family and effects there, should, during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he may be dealt with as a traitor.

It is provided in England by the Imperial Naturalization Act of 1870, with regard to all titles accruing after that date, that real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and that a title thereto may be derived through, from, or in succession to an alien as if he had been such a subject.

But the Act confers no right on an alien to hold property *out of* the United Kingdom; nor to hold any municipal, parliamentary or other office or franchise, or to be the owner of a British ship. (1 Com. 134.)

In *Low v. Routledge* (11 Jurist N. S., part 1, p. 939) it was held by the Court of Appeal in Chancery, confirming 10 Jur. N. S. 922 (Parke, B., delivering the Judgment of the Court):

That every alien coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of the laws which affect all British subjects—that by the laws of Great

Britain a copyright is personal property, and that an alien friend may, by the common law, have, acquire or get within the realm, by gift, trade or other lawful means, any treasure or goods personal whatsoever as an Englishman, and may maintain any action for the same—that his rights and duties as a subject of the Crown thus acquired and attached cannot be impaired or put aside by colonial legislation.

In *Corse v. Corse* (4 L. C. R., 310) it was held :

That by Act 12 Vict. c. 197, passed by the 3rd Provincial Parliament of Canada, which enacts that "every alien shall have the same capacity to take, recover and transmit real estate in all parts of the Province as natural-born subjects," the disabilities of aliens are removed, and every alien has the same capacity to take, recover and transmit real estate in all parts of the Province as natural-born subjects of Her Majesty.

(The above Act continued in force by sec. 129 of B. N. A. Act.)

The following Acts were passed by the Parliament of Canada respecting aliens since 1st July, 1867 :

An Act respecting aliens and naturalization, (31 Vict. c. 66, assented to 22nd May, 1868), providing that Provincial Naturalization shall be extended to the Dominion.

An Act (34 Vict. c. 22) to amend the preceding Act by giving to all aliens who, before the 1st July, 1867, resided in any of the Provinces which now form Canada, and now residing in Canada, the privileges of naturalization on taking the oath of allegiance.

An Act (36 Vict. c. 36) to extend the preceding Acts to the Provinces of British Columbia, and Manitoba.

The Statute 7 & 8 Vict. c. 66 was passed by the Imperial Parliament to enable alien friends to partake of the rights and capacities of British subjects.

The statute 10 & 11 Vict. c. 83 was passed by the Imperial Parliament, legalizing within the limits of Her Majesty's Colonies, Acts, Statutes or Ordinances "heretofore made and enacted," and "which shall hereafter be made and enacted by the Legislatures of any of Her Majesty's Colonies," for imparting to any person or persons the privileges or any of the privileges of Naturalization.

But by the Imperial Naturalization Act of 1870 (33 Vict. c. 14), 7 & 8 Vict. c. 66 and 10 & 11 Vict. c. 83 are wholly repealed.

Art. 16 of the Imperial Naturalization Act of 1870 provides, however, that :

16. All Laws, Statutes and Ordinances which may be duly made by the Legislature of any British possession for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes or ordinances in that possession.

See also Rules and Regulations for Her Majesty's Colonial Service, 11 Hertzlet's Com. Treaties, p. 310.

26. Marriage and Divorce.

Mr. Serjeant Stephen (Comm., p. 238) says :

In England, under the union of the Church and State, when marriage ranked as a sacrament of the Church it naturally, when the Roman Catholic faith was the established religion, fell under the cognizance of Ecclesiastical Courts.

But, by Acts of Parliament, these Courts were stripped of their jurisdiction in this respect and in the year 1860, by Statute 20 & 21 Vict. c. 85, a new Court was erected, under the title of the Court of Divorce and Matrimonial Causes; the jurisdiction over such matrimonial matters as usually fell under the cognizance of the Ecclesiastical Courts, was bestowed upon this Court.

A still more extended jurisdiction was given to it by 21 & 22 Vict. c. 93, which enacted that parties might apply to this Court for a declaration of their legitimacy or of the validity of the marriages of their fathers and mothers, or of their grandfathers and grandmothers; or for a declaration of their own right to be deemed natural born citizens.

Reynolds v. The United States (98 U. S., S. C., 145), Held :

That a Statute declaring bigamy committed in the Territories a crime against the United States, and prescribing its punishment, was in all respects constitutional and valid.

By an Act (28 and 29 Vict. c. 64) passed "to remove doubts respecting the validity of certain marriages contracted in Her Majesty's possessions abroad," it was enacted that "every law made or to be made by the Legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose afore-

said within all parts of Her Majesty's Dominions, as such law may have had, or may hereafter have, within the Possession for which the same was made."

Astill et vir v. Hallee (4 Q. L. R. 20), 1877, Court of Review, Quebec (Meredith, C. J., Casault, J., Caron, J.), Held :

That a community of property does not exist between persons who, having been domiciled and married without contract in a place where the law of community did *not* exist, afterwards established their domicile and acquired real property in a country where the law of community *did* exist. See Sect. 92, ss. 12.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

By this section, the exclusive legislative authority of the Parliament of Canada is extended to all matters relating to "the Criminal Law," and "the procedure in Criminal Matters."

It will become necessary in many cases for the Courts to determine what constitutes a crime, and to distinguish criminal matters from civil matters.

Blackstone says (1 Comm. 268),

All offences are either against the king's peace, or his crown and dignity ; and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason, and a very few others) to be rather offences against the kingdom than the king, yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate : all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public.

In *Regina v. Roddy* (41 U. C., Q. B. 296), Held :

That a conviction for selling intoxicating liquors in violation of 37 Vic. c. 32, Ont., obtained on defendant's evidence, quashed for the reason that, being a charge of a criminal character, the defendant could not be compelled to give evidence against himself.

Harrison, C. J., in delivering the judgment of the Court, said :

It cannot be held that, while the Provincial Legislatures have the incidental power of enacting certain laws of a criminal character when necessary for the enforcement of laws properly passed by them, on matters under their exclusive jurisdiction, that they have the power,

directly or indirectly, of destroying the general rules of evidence appertaining to Criminal Procedure or *quasi* Criminal procedure throughout the Dominion.

The proper definition of the word crime is, an offence for which the law awards punishment: Per Bayley, J., in *Mann v. Owen* (9 B. & C. 595–599). A crime or misdemeanor is an act omitted or committed in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word crime is made to denote such offences as are of a deeper or more atrocious dye, while smaller faults and omissions of less consequence are comprised under the general names of misdemeanors only. *Butt v. Conant* (1 B. & B. 548–575.)

In *Attorney General v. Bowman* (2 B. & P. 532, note), an information against the defendant for keeping false weights was held by Eyre, C. B., not to disclose a crime.

In *Huntley v. Luscombe* (2 B. & P. 530) it was made a question whether a commitment in execution for a penalty before a magistrate for an offence against the excise laws is a commitment for “criminal matter” within the provisions of the *Habeas Corpus* Act.

In *Rex v. Myers* (1 T. R. 265) it was held that a person who had been convicted in a penalty under the Lottery Act, 22 Geo. II. ch. 47 and arrested on a Sunday and sent to the house of correction for want of a sufficient distress, was not a criminal; so that his arrest on Sunday was unlawful.

In *Easton's Case* (12 A. & E. 645) it was held that a person sentenced by two justices to imprisonment with hard labor, under the Smuggling Act, 4 & 5 Wm. IV., ch. 13, sec. 2, was in execution for criminal matter under the *Habeas Corpus* Act, Lord Denman saying: “the party is sentenced to imprisonment at *hard labor*, which puts the point beyond doubt.”

In *Attorney General v. Radloff* (10 Exch. 84) the Court, consisting of four Judges, was equally divided on the question whether the trial of an information filed by the Attorney General for the recovery of penalties for smuggling under sections 46 and 82 of 8 & 9 Vic. ch. 87, was a civil or criminal proceeding.

In *Parker v. Green* (2 B. & S. 299), a proceeding before justices preferred under 9 Geo. IV., ch. 61, against a person licensed to sell exciseable liquors by retail.

Crompton, J., in delivering judgment said (p. 311), “When a pro-

ceeding is treated by a statute as imposing a penalty for an offence against the public, the amount of which penalty is to be meted by the justices according to the magnitude of the offence, there can be no doubt that the proceeding is a criminal one." And Wightman, J., said (p. 309), "the justices may punish such offender by fine,—thus treating fine as a punishment for an offence against good order and rule."

The latter decision was followed in *Regina v. Sullivan* (L. R. 8 Ir. C. L. 404), where the charge was "for keeping a dog without a license contrary to the Dogs Regulation (Ireland) Act, 1865. Palles, C.B., said, p. 407, "the penalty is imposed by way of punishment and not as compensation to any particular individual."

Clemens qui tam v. Bemmer (7 Can. L. J., N.S., 126), Hughes, Co. J., held :

That under the B. N. A. Act of 1867, the Dominion Parliament had the exclusive right to legislate upon the subject of the returns of convictions and fines for criminal offences.

If it were competent for the Dominion Parliament to legislate concerning the summary trial of criminal offences, and lay down the procedure therefor, I apprehend it was also competent for them to deal with the returns of the convictions and its results, to prescribe their legitimate conclusions, and to affix or impose any penalty for non-observance of what was laid down. With that power, as a necessary consequence, must follow the jurisdiction to alter, amend or repeal any existing law affecting the same subject, for the purpose of assimilating the criminal laws of the whole Dominion. I cannot therefore understand that the Dominion Legislature has jurisdiction over a given subject up to a certain point, and that the Provincial Legislature has the right to step in and begin legislation where the Dominion Parliament has left off. The jurisdiction to legislate and deal with any given subject must be entirely under the control of the one or the other, and not under the piecemeal authority of both. If it were otherwise, the statute law of the country would assume such a fragmentary character that in a few years we should find it difficult to wend our way through its perplexities.

In *Regina v. Lake* (43 U. C., Q. B., 515) by a unanimous Court, held :

That the Local Legislature, by providing by law that a sale of liquor in certain municipalities, of quantities prohibited by law to be sold therein by the Temperance Act of 1864, should be a contravention of 37 Vic. ch. 32, secs. 24 and 25, as a selling by retail without

a license, exceeded their powers. They were, by so doing, directly legislating upon criminal law, and enacting criminal procedure for the punishment of offences against the Temperance Act of 1864.

In *Regina v. Lawrence* (43 U. C., Q. B., 164) :

A conviction for selling intoxicating liquor in violation of the License Act, 37 Vic. c. 32, Ont., obtained on defendant's evidence, quashed, for the reason that the defendant could not be compelled to give evidence against himself, under section 4 of 36 Vic., ch. 10, O.

Gwynne, J., held that section 57 of that Act was *ultra vires* of the Local Legislature and an encroachment upon the jurisdiction of the Dominion Parliament, the Provincial Legislature having no direct power to legislate either as to crime or criminal procedure, under the British North America Act 1867, sec. 91, sub-sec. 27.

That section 57, professing to punish a person for inducing or attempting to induce, by bribery or threats, a witness not to give evidence, or to give false evidence, upon a prosecution for an offence against the Liquor License Act, cannot be regarded as a clause within the meaning of the 15th sub-section of the 92nd sec. of the B. N. A. Act *for enforcing* the Act for regulating the sale of liquors.

One of the subjects exclusively assigned to the Provincial Legislatures is the right to make laws as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes."

Where the purpose of the Provincial Statute is not to raise a revenue for any such purpose, but to suppress some public vice, even by the sacrifice of revenue, the Act is not one which can be validly passed under the words which we have quoted, and, unless held to be the exercise of mere police or municipal power, is void.

Where the effect of such a Statute is to interfere with the trade and commerce of the Dominion it is a direct encroachment upon the powers which exclusively belong to the Dominion or General Parliament of the Country (sec. 91, sub-sec. 2).

On appeal (43 U.C., Q.B., 174) :

It was held by a unanimous Court (Harrison, C.J., Hagarty, Wilson, Armour, Cameron, J.J., affirming the judgment of Gwynne, J.): That the acts declared to be offences under sec. 57 of the Liquor License Act of Ontario were before the passing of that Act criminal offences at the common law, and so not within the power of a Provincial Legislature either as coming under "Municipal Institutions" or under the

pretence of being passed to enforce a law as to "shop, saloon, tavern, auctioneer, or other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

Harrison, C. J., delivering the judgment of the Court, said :

That, dealing with an offence clearly indictable at common law, subornation of perjury, it was *ultra vires* of the Local Legislature ; unless the clause, although dealing with what would be a misdemeanor at common law, is brought within the jurisdiction of the Local Legislature, by sub-section 15 of section 92 of the British North America Act ; that is to say, unless clause 57 of ch. 181 of the Revised Statutes can be held to be a clause relating to "the imposition of punishment by fine, penalty, or imprisonment *for enforcing*" the law respecting the sale of spirituous liquors, and the raising of revenue for provincial, local, or municipal purposes, by the granting of licenses authorizing and regulating such sale.

But the provision in the 57th section is made in relation to an offence wholly collateral to the prosecution for a violation of the Liquor License Act.

It is a clause which in fact professes to provide a Court and procedure, wherein and whereby, in a particular case a person guilty of an offence indictable at common law, may be tried and convicted contrary to the course of the common law or of the criminal statute law in like cases. The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and to allow the Legislature of a Province to declare that an act which, by the general law, is a crime, triable and punishable as a crime with the ordinary safeguards of the Constitution affecting procedure as to crime, shall be something other than or less than a crime, and so triable and punishable by magistrates as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject.

Proclamations.

The King has no prerogative but that which the law of the land allows him. He cannot by his proclamation change any part of the Common Law, Statute Law, or Customs of the realm ; nor can he create any offence by his prohibition or proclamation, for that would be to alter the law. But proclamations which call upon the subject to perform duties already enjoined by law are perfectly lawful ; and subsequent disobedience is an aggravation of the offence. 2 How. St. Trials, 723. Coke, 12th part, p. 73.

29. Such Classes of Subjects as are expressly excepted in

the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

(See Sect. 92, § 10, for Classes of Subjects excepted.)

A reference has been already made under sec. 91, ss. 2, to the case of the City of Fredericton and The Queen & Barker (3 Can. S. C., p. 505), as deciding that in the power to regulate a trade, conferred by sec. 91, ss. 2, on the Federal Government, was included the right of prohibition.

It has been thought instructive, however, on account of the general principles of construction enunciated as well as on account of the importance of the subject, to give a fuller abstract of the case, and it appears appropriately under this section, especially as it was held by Taschereau, J., that the Appeal should be allowed for the simple reason that as the Canada Temperance Act, 1878, could not be enacted by the Local Legislature—there being no express power given them to that effect—that power necessarily falls under the control of the Dominion Parliament.

Gwynne, J., was also of the opinion to allow the Appeal for the reason that The Temperance Act being *ultra vires* of the Provincial Legislatures, as dealing with a subject not exclusively assigned to them, *cadit questio*, for that point being so determined, then it is within the jurisdiction of Dominion Parliament.

That, inasmuch as the right of prohibiting any trade has been excluded from, by not being assigned to, the Provincial Legislatures, it must necessarily be taken under this section to have been delegated to the Federal Government.

The Mayor, Aldermen, and Commonalty of the City of Fredericton and the Queen, on the Prosecution of Thomas Barker.

In the Canada S. C., 13 April, 1880. On appeal from the Supreme Court of New Brunswick.

Held,—1. That the Act of the Parliament of Canada (41 Vic., c. 16), "An Act respecting the traffic in intoxicating liquors," cited as "The Canada Temperance Act, 1878," is within the legislative capacity of that body.

2. That by the British North America Act, 1867, plenary powers of legislation are given to the Parliament of Canada over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other.

3. That under sub-sec. 2 of sec. 91, B. N. A. Act, 1867, "regulation of trade and commerce," the Parliament of Canada alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the Court has no right whatever to enquire what motive induced the Parliament to exercise its powers.

Appeal from a judgment of the Supreme Court of New Brunswick quashing a return to a *mandamus nisi*, and ordering a peremptory *mandamus* to be issued in the cause

On the 1st day of May, 1878, the second part of The Canada Temperance Act, 1878, which prevents the sale of spirituous or intoxicating liquors, with certain exceptions, was brought into force in the City of Fredericton, N.B., pursuant to the provisions of the first part of that Act.

On the 18th day of October, 1878, the Supreme Court of New Brunswick, upon the application of Thomas Barker, who kept an hotel in Fredericton, issued a *mandamus nisi* to the Mayor, Aldermen and Commonalty of the City of Fredericton, commanding them to issue a license to the said Thomas Barker, to sell spirituous liquors by retail within the said city in his hotel, or to shew cause to the contrary.

The Mayor, &c., duly made answer and return to the writ of *mandamus*, refusing to grant the license for the following reasons, viz : "That The Canada Temperance Act, 1878, was declared in force in the City of Fredericton, on the first day of May last, and therefore the City Council could not grant a license to Thomas Barker to sell spirituous liquors by retail contrary to the provisions of that Act."

Upon motion to quash the return and for the issue of a peremptory *mandamus* all parties were heard by counsel. It was agreed that the only question which the Court should be called upon to decide was as to the power of the Parliament of Canada to pass The Canada Temperance Act, 1878 ; all technical and other objections were waived.

Chief Justice Ritchie :—

The respondent contends that the return is insufficient, and that the order for the issue of a peremptory writ of *mandamus* should be affirmed, on the ground that The Canada Temperance Act of 1878 is *ultra vires* of the Parliament of Canada ; and this is the only point submitted for our consideration.

The Act in question is entitled "An Act respecting the traffic in intoxicating liquors," and the preamble sets forth that

Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors :

Therefore Her Majesty, &c., enacts, &c.

It is contended, that assuming the Parliament of Canada has the power to pass an Act for the prohibition of traffic in intoxicating liquors provided for by the second part of the Act, that the first part of the Act is a delegation of legislative powers to a portion of the people ; that the Dominion Parliament have no right to delegate such powers, or to make its regulation subject to, or conditional on, its acts being adopted by any other body.

It cannot be doubted that the Parliament of Great Britain has the general power of making such regulations and conditions as it deems expedient with regard to the taking effect or operation of laws,—either absolute, or conditional and contingent.

Although the Dominion Parliament does derive its powers from the British North America Act, it cannot, I think, be successfully disputed that with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given “as large and of the same nature as those of the Imperial Parliament itself,” and therefore they may be exercised either absolutely or conditionally, and, as was established by the Privy Council in the case of *The Queen v. Burah* (cited in *Valin v. Langlois*) leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. The Parliament of Great Britain having, as I think, conferred on the Dominion Parliament this general, absolute, uncontrolled authority to legislate in their discretion on all matters over which they have power to deal, subject only to such restrictions, if any, as are contained in the B. N. A. Act, and subject, of course, to the sovereign authority of the British Parliament itself, with reference to the question under consideration, I can find in the B. N. A. Act no limitation, either in terms or by necessary implication, of the general power so conferred, and without which the legislative power should not, in my opinion, be limited by judicial interpretation. In the United States, where frequent discussions have arisen under the written constitutions, Federal and State, by which the legislative powers are limited and restricted, Mr. Cooley, in his work on statutory limitations thus states the doctrine as there understood (1) :

But it is not always essential that a legislative act should be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event.

It has likewise been urged that this Act affects only particular districts, that it is not general legislation, and therefore is *ultra vires*. I

am entirely unable to appreciate this objection. If the subject matter dealt with comes within the classes of subjects assigned to the Parliament of Canada, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.

This brings us to the consideration of the really substantial question in this case, which arises under the second part of the Act, viz. : Has the Dominion Parliament the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it ?

Sec. 99 enacts that—

From the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for *bona fide* use in some art, trade or manufacture under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, *shall within such county or city, by himself, his clerk, servant or agent, expose or keep for sale, or directly, or indirectly, on any pretence or upon any device sell or barter, or in consideration of the purchase of any other property, give to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating.*

Sub-section 2 provides that—

Neither licenses to distillers or brewers,—nor for retailing on board any steamboat or vessel,—nor yet any other description of license whatever,—shall in any wise avail to render legal any act done in violation of this section.

Sub-section 3 provides for the sale of wine for exclusively sacramental purposes, and sub-section 4 for the sale of intoxicating liquor for exclusively medicinal, or for *bona fide* use in some trade or manufacture.

Sub-section 5 contains a proviso—

That any producer of cider in the county, or any licensed distiller or brewer, having his distillery or brewery within such county or city, may thereat expose and keep for sale such liquor as he shall have manufactured thereat, and no other; and may sell the same thereat, but only in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at any one time, and only to druggists and others licensed as aforesaid (that is to sell for sacramental, medicinal and trade purposes), or to such persons as he has good reason

to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, and to be wholly removed and taken away in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at a time.

Sub-section 6 contains a proviso of a similar character in favor of—

Any incorporated company authorized by law to carry on the business of cultivating and growing vines and of making and selling wine and other liquors produced from grapes, having their manufactory within such county or city.

With a further proviso by sub-section 7—

That manufacturers of pure native wines made from grapes grown and produced by them in the Dominion of Canada, may, when authorized to do so by license from the municipal council or other authority having jurisdiction where such manufacture is carried on, sell such wines at the place of manufacture in quantities of not less than ten gallons at one time, except when sold for sacramental or medicinal purposes, when any number of gallons from one to ten may be sold.

And by sub-section 8 it is provided also—

That any merchant or trader exclusively in wholesale trade, and duly licensed to sell liquor by wholesale, having his store or place for sale of goods within such county or city, may thereat keep for sale and sell intoxicating liquor, but only in quantities not less than ten gallons at any one time, and only to druggists and others licensed as aforesaid, or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, to be wholly removed and taken away in quantities not less than ten gallons at a time.

It is contended that this is strictly a Temperance Act, passed solely for the promotion of temperance, and not an Act dealing with any of the matters within the power of the Dominion Parliament—that the power to deal with the sale of spirituous liquors and the granting of licenses therefor, and laws for the prevention of drunkenness, and of the like character of preventive means, are within the exclusive power of the Local Legislatures, and the recital of the Acts is relied on as indicating conclusively its character.

If the Dominion Parliament legislates strictly within the powers conferred in relation to matters over which the British North America Act gives it exclusive legislative control, we have no right to enquire what motive induced Parliament to exercise its powers. The statute declares it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the

peace, order and good government of Canada, in relation to all matters not coming within the class of subjects by this Act assigned exclusively to Legislatures of the Provinces, and, notwithstanding anything in the Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects enumerated, of which the regulation of trade and commerce is one; and any matters coming within any of the classes of subjects enumerated shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces. If, then, Parliament, in its wisdom, deems it expedient for the peace, order and good Government of Canada so to regulate trade and commerce as to restrict or prohibit the importation into, or exportation out of, the Dominion, or the trade and traffic in, or dealing with, any articles in respect to which external or internal trade or commerce is carried on, it matters not, so far as we are judicially concerned, nor had we, in my opinion, the right to enquire whether such legislation is prompted by a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, or any other object which may, by regulating trade and commerce, or by any other enactments within the scope of the legislative powers confided to Parliament, tend to the peace, order and good Government of Canada. The effect of a regulation of trade may be to aid the temperance cause, or it may tend to the prevention of crime, but surely this cannot make the legislation *ultra vires*, if the enactment is, in truth and fact, a regulation of trade and commerce, foreign or domestic.

The power to make the law is all we can judge of; and the recital in the Act so much relied on ought not, in my opinion, to affect in any way the enacting clauses of the Act, which are in themselves abundantly plain and explicit, requiring no elucidation from and admitting of no control by the recital, which can only be invoked in explanation of the enacting clauses if they be doubtful. Why it was deemed necessary to insert the self-evident abstract proposition that "it is very desirable to promote temperance in the Dominion," and to enact that this Act may be cited as "The Canada Temperance Act, 1878," does not seem very apparent when the title of the Act itself was "an Act respecting the traffic in intoxicating liquors," and it contained a recital, that it was desirable there should be uniform legislation in all the Provinces respecting such traffic, which shows the legislation on its face

immediately within the power of Parliament. It may be, that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone, and desired that idea should prominently appear. Still, if the enacting clauses of the Act itself deal with the traffic in such a manner as to bring the legislation within the powers of the Dominion Parliament, no such declaration in the preamble or permissive title can so control the enacting clauses as to make the Act *ultra vires*; though it cannot be doubted that the introduction of this temperance element on the face of the Act may have very much stimulated the idea, which has been so much relied on, that the legislation was not a regulation of trade and commerce, but was for the suppression of intemperance, a matter assumed to be within the exclusive power of the Local Legislatures, and so beyond the powers of the Dominion Parliament. If we eliminate from the recital in the Act the abstract proposition and the permissive clause to cite the Act as "The Canada Temperance Act, 1878," there does not appear to be a word in the title, preamble or enacting clauses from which the slightest inference could be drawn that Parliament was dealing with a subject-matter, other than simply as a regulation of trade and commerce in respect to the traffic in those particular articles of intoxicating liquors.

It has also been contended that no legislative powers to prohibit exist in the Dominion. I must respectfully, but most emphatically dissent from this proposition. I cannot for one moment doubt, that by the B. N. A. Act plenary power of legislation was vested in the Dominion Parliament and Local Legislatures respectively to deal with all matters relating to the purely internal affairs of the Dominion, unless, indeed, anything could be found in the Act in express terms limiting such power, each, of course, acting within the scope of their respective powers; and, therefore, where one has not the power so to legislate, it necessarily belongs to the other. If this be so, then the question is, is this legislation within the powers conferred on the Dominion Parliament, or does it encroach on the powers exclusively confided to the Local Legislature? For, with its expediency, its justice or injustice, its policy or impolicy, we have nothing whatever to do.

Much has been said as to the analogy of the Dominion Parliament and Local Legislatures with the Congress of the Federal Government and the State Legislatures of the United States. But the constitution of the United States and the constitution of the States as regards the powers which each may exercise, are so different from the relative powers of the Dominion Parliament and Provincial Legislatures, that

the cases to be found in the American books, with regard to the powers of the State Legislatures in prohibiting the sale of intoxicating liquors, afford no guide whatever in the determination of the powers of the Local Legislatures and the Dominion of Canada. The Government of the United States is one of enumerated powers, and the Governments of the States possess all the general powers of legislation. Here we have the exact opposite. The powers of the Provincial Governments are enumerated and the Dominion Government possesses the general powers of legislation. Therefore we are told by Mr. Cooley that :

When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified powers is broad enough to embrace it, but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States, or of the State, we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative power, but in the Constitution of the State to ascertain if any limitations have been imposed upon the complete power with which the Legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication, while the State Legislature has jurisdiction of all subjects in which its legislation is not prohibited. Cooley, *Cons. Lim.*, 173.

With us the Government of the Provinces is one of enumerated powers, which are specified in the B. N. A. Act, and in this respect differs from the Constitution of the Dominion Parliament, which, as has been stated, is authorized "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces;"—and that "any matter coming within any of the classes of subjects enumerated shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces." Therefore "the regulation of trade and commerce," being one of the classes of subjects enumerated in sec. 91, is not to be deemed to come within any of the classes of a local or private nature assigned to the Legislatures of the Provinces.

To my mind, it seems very clear that the general jurisdiction or sovereignty which is thus conferred emphatically negatives the idea that there is not within the Dominion legislature, power or authority to deal with the question of prohibition in respect to the sale or traffic in intoxicating liquors, or any other articles of trade or commerce.

It is said that a power to regulate does not include a power to pro-

hibit. Apart from the general legislative power which, I think, belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange indeed, that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the importation or exportation of any article of trade or commerce, or, having that power, could not prohibit the sale and traffic, if they deemed such prohibition conducive to the peace, order and good government of Canada.

There seems to be no doubt on this point in the United States. Mr. Story on the Constitution of the United States, with reference to the regulation of foreign commerce, which belongs to the National Government (as the regulation of both foreign and internal trade and commerce does to the Dominion Government) says :

The commercial system of the United States has also been employed for the purpose of revenue ; sometimes for the purpose of prohibition ; sometimes for the purpose of retaliation and commercial reciprocity ; sometimes to lay embargoes ; sometimes to encourage domestic navigation and the shipping and mercantile interests, by bounties, by discriminating duties, and by special preferences and privileges ; and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. Story, *Com., Con. U. S.*, s. 1076.

So in the case of the *United States v. Halliday*, 3 Wall. 407, as to the rights of Congress under its power to regulate commerce with the Indian tribes, the Supreme Court of the United States held that that power extended to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it was carried on were wholly within the territorial limit of the State. The Act made it penal to sell spirituous liquors to an Indian under charge of an Indian agent, although it was sold outside of an Indian reserve and within the limits of a State. The Court held the Act constitutional and based upon the power of Congress to regulate commerce with the Indians.

The contention in this case, as put by the learned Judge who delivered the judgment of the Court, was, "that so far as the Act was intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State—among its own inhabitants or citizens, and not within the powers conferred on Congress by the

commercial clause." But the Court thus deals with this contention—Mr. Justice Miller says :

The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the State, is, we think, still more clearly entitled to be called a regulation of Commerce. "Commerce," says Chief Justice Marshall, in the opinion in *Gibbons vs. Ogden* to which we so often turn with profit when this clause of the Constitution is under consideration, "Commerce undoubtedly is traffic, but it is something more, it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce and a very important one.

If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign Governments, as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes. The Act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

In the same opinion to which we have just before referred, Judge Marshall, in speaking of the power to regulate commerce with foreign States, says :

"The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines. If Congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from these propositions, which seem to be incontrovertible, that if commerce or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian tribes.

It has been likewise very strongly urged that the Dominion Parliament cannot have the right to prohibit the sale of intoxicating liquors as a beverage, because to do so would interfere with the right of the Local Legislatures to grant licenses and to deal with property and civil rights and matters of a purely local character, and, so with the right of the Local Legislatures to raise a revenue by means of shop and tavern licenses. I fail to appreciate the force of this objection. If substantial, it would prohibit to a great extent the Dominion Parliament from legislating in respect to that large branch of trade and commerce carried on in intoxicating beverages, and so take away the full right to regulate alike foreign and internal commerce. If they cannot prohibit the internal traffic because it prevents the Local Legislatures from raising a revenue by licensing shops and taverns, the same result would be produced if the Dominion Parliament prohibited its importation or manufacture. For by the same process of reason it must follow that they could not prohibit its importation or manufacture, or in any way regulate the traffic, whereby the sale or traffic should be injuriously affected and so the value of licenses be depreciated or destroyed. In my opinion, if the Dominion Parliament, in the exercise of and within its legitimate and undoubted right to regulate trade and commerce, adopt such regulations as in their practical operation conflict or interfere with the beneficial operation of Local Legislation, then the law of the Local Legislature must yield to the Dominion law, because matters coming within the subjects enumerated as confided to Parliament are not to be deemed to come within the matters of a local nature comprised in the enumeration of subjects assigned to the Local Legislatures; in other words, the right to regulate trade and commerce is not to be overridden by any Local Legislation in reference to any subject over which power is given to the Local Legislature. A case, precisely analogous in principle to this, is to be found in the Reports of the United States Supreme Court, *License Tax Cases*, 5 Wall. 462, where the State Legislature had the control of the internal commerce, and the Federal Government the right to raise a revenue by licenses, while, here the Dominion Government have the control of the internal trade and commerce, and the Local Legislatures the right of raising a revenue by granting licenses. It was not doubted that where Congress possessed constitutional power to regulate trade and commerce, it might regulate it by means of licenses, and in case of such a regulation a license would give authority to the licensee to do whatever its terms authorized, but that very different considerations applied to the internal commerce or domestic trade of the States, over which Congress had no power to regu-

late, nor any direct control, but the power belonged exclusively to the States. There the power to authorize a business within the State was held plainly repugnant to the exclusive power of the State over the same subject. So here, over trade and commerce the Local Legislature have no power of regulation nor any direct control, and therefore the power of the Local Legislature to authorize a business is equally repugnant to the power of the Dominion Parliament over the same subject; and therefore, while Congress had the power to tax, it was held to reach only existing subjects, and could not authorize a trade or business within a State, in order to tax it; that if the licenses were to be regarded as giving authority to carry on the branches of business which they license, it would be difficult, if not impossible, to reconcile the granting of them with the constitution. But it was held that it was not necessary to regard the laws as giving such authority, that, so far as they related to trade within State limits, they gave none and could give none.

If this same principle is applied here, the right of the Local Legislatures to tax by means of licenses gave the licensees no authority to exercise trade or carry on business prohibited by the Dominion Parliament which has the control of trade and commerce. I think it equally clear that the Local Legislatures have not the power to prohibit; the Dominion Parliament having not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce, and of imposing duties of customs and excise; and having by law authorized the importation and manufacture of alcoholic liquors, and exacted such duties thereon, and so far legalized the trade and traffic therein, to allow the Local Legislatures—under pretence of police regulation, on general grounds of public policy and utility—by prohibitory laws to annihilate such trade and traffic, and practically deprive the Dominion Parliament of a branch of trade and commerce from which so large a part of the public revenue was at the time of confederation raised in all the Provinces—and has since been in the Dominion—never could have been contemplated by the framers of the B. N. A. Act. It is, in my opinion, in direct conflict with the powers of Parliament, as well over trade and commerce, as with their right to raise a revenue by duties of import and excise.

When I had the honor to be Chief Justice of New Brunswick, the question of the right of the Local Legislatures to pass laws prohibiting the sale or traffic in intoxicating liquors came squarely before the Supreme Court of that Province, and that Court, in the case of *Regina v.*

Justices of King's County, 2 Pugs. 535, unanimously held that under the B. N. A. Act, the Local Legislature had no power or authority to prohibit the sale of intoxicating liquors, and declared the Act passed with that intent *ultra vires*, and therefore unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit. I think the same now. I then thought the power belonged to the Dominion Parliament, I think so still, and therefore am constrained to allow this appeal.

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive provincial legislation:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated ; that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.

3. The Borrowing of Money on the sole credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province, and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial, Local, or Municipal purposes.

10. Local Works and Undertakings other than such as are of the following Classes:—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of CANADA to be for the general Advantage of CANADA, or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely Local or Private Nature in the Province.

§ 1. The Amendment, &c., of the Constitution, &c.

The Legislatures of the Provinces of Manitoba and British Columbia now consist of only one House, the Upper House having been abolished in each Province under the powers conferred by this section.

§ 2. Direct taxation within the Province in order to, &c.

Angers, pro Regina and The Queen Insurance Co., Held, by Superior Court, Montreal, Tarrance, J., affirmed by Queen's Bench, Montreal, and confirmed by the Jud. Com. of the Privy Council (21 L. C. J. 77; 22 L. C. J. 307; 16 C. L. J. 198; 3 L. R. App. Cases 1090):

That 39 Vic. c. 7, Quebec, entitled "An Act to compel assurers to take out a License," obliging every assurer in the Province, other than a marine assurer exclusively, to take out a license every year, the price of such license to consist in the payment of three per cent. as to assurance against fire, and of one per cent. as to other assurances, for each hundred dollars or fraction thereof on all premiums or renewals of premiums received, was *ultra vires*, as being an indirect mode of taxation and an attempt to regulate trade.

In the Q. B.,—Sir A. A. Dorion, C. J., said : I concur in the judgment on the following grounds :

The Local Legislature has the right to impose direct taxes and to grant licenses as a means of raising revenue for Provincial and municipal purposes.

Now the charge imposed is clearly an indirect tax. It is not imposed on the Insurance Co. itself, but upon the business which it is doing—that is, the insurer is obliged to place a stamp on every policy issued, according to the amount of such policy. It is as much an indirect tax as the taxes of excise or of customs. They are not intended to be paid by the insurer, but to be paid by the insured, whoever they may be.

This case must be brought under the provisions allowing the Local Legislatures to grant licenses. I am not prepared to state that the Local Legislatures have not the right to grant licenses to insurance companies, to banks, &c. ; but if the Legislatures have that right they must do it in such form as not to violate one of the restrictions of the Confederation Act, which does not authorize them to impose indirect taxes.

The Local Legislatures are authorized to grant licenses and to raise revenue on such licenses as were usually granted. Now, there was not, at the time the Confederation Act was passed, a single license granted on which the payment or fee was laid on the amount of business done. All licenses granted were for a fixed sum.

This view was carried so far that in the Act to regulate the business of auctioneers, each auctioneer had to pay a fixed sum, which represented the price of the license, and another sum of 1 per cent, on the price of the goods sold, this last sum to be added to the price of the goods sold.

The duty imposed by the Local Legislature is not therefore a license fee, such as was known in this country at the time of the Confederation Act. I therefore find that although in form a license appears to have been granted, in substance, it is an indirect tax which has been imposed.

It is an evasion of the Act from which the Local Legislature derives its powers. The Local Legislature cannot, no more than private individuals, act as it were in *fraud of the law*, that is, do by indirect means what it cannot effect directly.

As to the question whether the Local Legislature has a right to force an Insurance Company to take a license, I am not called upon to express an opinion, and there is great difficulty in the question.

For the reasons stated I confine myself to saying that the duty imposed upon insurance companies is an indirect tax which the Local Legislature had no authority to impose.

In the Q. B.,—H. E. Taschereau, J., said: (*Translation.*)

By the Act of the Legislature of Quebec, 39 Vict. ch. 7, entitled "An Act to compel assurers to take out a License," it is enacted that "every assurer carrying on in the Province any business of assurance, other than that of marine assurance exclusively (or business of assurance against accidents, for a period less than 30 days—40 Vict. ch. 6) shall be bound to take out a license, in each year, from one of the revenue officers, the price of such license to consist in the payment to the Crown for the use of the Province, at the time of the issue or delivery of any policy of assurance, and at the time of the making or delivery of each premium, receipt or renewal, respecting such assurance, of a sum computed at the rate of three per cent. as to assurance against fire, or of one per cent. as to other assurances, for each hundred dollars, or fraction of one hundred dollars of the amount received as premium, or renewal of assurance, and such payment was to be made by means of adhesive stamps, equivalent in value to the amount required, to be affixed on the policy of assurance, receipt or renewal." Any person who shall not comply with the provisions of this Act is made liable for each contravention, to a penalty not exceeding fifty dollars, or in default of payment, unless the person be a corporation, to imprisonment not exceeding three months. The Act further declared that policies of assurance, premium receipts or renewals, not stamped as required by the Act, could not be invoked and were to have no effect in law, or in equity, before the Courts of this Province.

By the 122nd section of "The Quebec License Act," which is made applicable to the above Act, 39 Vict. ch. 7, by its 9th section, the Governor-in-Council may at any time, for sufficient cause, in his discretion, revoke and annul any license thus granted to any Insurance Company, and by the 124th section of the same Quebec License Act, a

fee of one dollar is payable to the revenue officer for every license given by him.

Had the Legislature of Quebec the power to pass this Statute? This is the abstract question, submitted for our decision in this cause, and the only matter in dispute between the parties.

In England, Parliament is omnipotent. Its power is absolute and supreme, and Hallam (Const. Hist., vol. 3, p. 193) has not hesitated to say that "the absolute power of the Legislature, in strictness, is as arbitrary in England as in Persia." In this country it is very different. Since Confederation, both the Federal Parliament and the Local Legislatures have limited powers.

It is true that the Federal Parliament has a quasi sovereignty. Its jurisdiction is far greater than that of the Local Legislatures, but there are subject matters over which it has no jurisdiction. They are those matters, which, by the British North America Act, are left, without any concurrent jurisdiction in the Federal Parliament, to the jurisdiction of the Local Legislatures.

The latter have only such powers as are specially assigned to them, and which are by exception taken from the Federal and given to the Local Legislatures.

Let us examine, therefore, whether, under the distribution of the legislative powers made by the Imperial Statute, the Legislature of Quebec could pass this Statute, imposing a tax on assurance companies and compelling them to take out a license?

The 91st section of the Imperial Act enacts that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects, by this Act, exclusively assigned to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act), the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say" (*inter alia*):

§ 2. The regulation of trade and commerce. § 3. The raising of money by any system of taxation, "and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned

exclusively to the Legislatures of the Provinces." This refers to the Federal Parliament. In dealing with the powers of the Legislatures of the Provinces, the 92nd section declares that "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say (*inter alia*):

§ 2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

§ 9. shop and saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

The other parts of these sections have no bearing upon the present case.

The determination of this question depends entirely on the construction to be put on sub-sections 2 and 9 of the above 92nd section of the Imperial Statute.

The Federal Parliament has the general power to make laws in relation to all matters, excepting only such matters as are by the 92nd sec. specially put under the control of the Local Legislatures. The Local Legislatures, on the contrary, have power to make laws only in relation to matters specifically and nominally put under their control by section 92. In order to ascertain whether any given subject matter is under the jurisdiction of one of the legislative bodies, created by the Imperial Statute, it is sufficient to refer to the 92nd section and see if by that section the subject matter is or is not put under the control of the Provincial power. If not it comes within the legislative authority of the Federal Parliament, even if not one of the classes of subjects specially enumerated as being specially reserved for that Parliament by the 91st section of the Act.

This proposition was not contested by the learned counsel whose duty it has been to contend in favor of the constitutionality of this Act, but it is on the 92nd section that he relies to prove that the Legislature of Quebec had the legislative authority to pass this Statute. He contended that it might be possible to consider the taxes imposed by 39 Vict. c. 7, as a direct tax. Then, under the 2nd sub-section of section 92, which gives the power of direct taxation to the Legislatures of the Provinces, this Act is unimpeachable. But should it be declared that the duties imposed were not a direct tax, then, he says, the Act is nevertheless constitutional, because it is authorized by the 9th sub-

section, which gives to Local Legislatures the control of "Shop, saloon, auctioneer, tavern, and other licenses."

As to whether the duties imposed on these Companies constitute a direct or an indirect tax. I consider they constitute an indirect tax. It is a stamp duty, which has been imposed by the Legislature on policies of assurance and renewal receipts respecting such policies and nothing else. That it ought to be considered a stamp duty or a license does not make any difference as it is in both cases an indirect tax.

"On peut ranger sous deux chefs principaux (says J. B. Say, an author of great repute on Political Economy) les différentes manières qu'on emploie pour atteindre les revenus des contribuables. Ou bien on leur demande directement une portion du revenu qu'on leur suppose, c'est l'objet des *contributions directes* ; ou bien on leur fait payer une somme quelconque sur certaines consommations qu'ils font avec leur revenu ; c'est l'objet de ce qu'on nomme en France les *contributions indirectes*."

After stating what are *direct taxes*, the same author says : "Pour asseoir les contributions indirectes et celles dont on veut frapper les consommations, on ne s'informe pas du nom du redevable, on ne s'attache qu'au produit. Tantôt, dès l'origine de ce produit, on réclame une part quelconque de sa valeur, comme on fait en France pour le sel. Tantôt cette demande est faite au moment où le produit franchit les frontières (les droits de douanes). Tantôt c'est au moment où le produit passe de la main du dernier producteur dans celle du consommateur qu'on fait contribuer celui-ci (en Angleterre par le *stamp duty*, en France par l'impôt sur les billets de spectacles). Tantôt le gouvernement exige que la marchandise porte une marque particulière, qu'il fait payer, comme le contrôle de l'argent, les timbres des journaux. Tantôt il frappe non la marchandise elle-même mais l'acquittement de son prix, comme il le fait par le timbre des quittances et des effets de commerce. Toutes ces manières de lever les contributions se rangent dans la classe des *contributions indirectes* parce que la demande n'en est adressée à personne directement, mais au produit ou à la marchandise frappée de l'impôt." [Say, *Economie Politique*, pp. 521, 523.]

All our text writers and jurists agree in giving the definition of *indirect taxes* in the same language as that I have just cited. I will only add two others—Favard de Langlade et Merlin. The former says : "On appelle contributions indirectes les contributions établies par la loi sur les choses dont l'usage est ordinaire dans les habitudes de la vie. Elles sont indirectes en ce qu'elles ne portent nominativement

sur aucun contribuable, qu'elles ne sont acquittées que par le consommateur, quel qu'il soit, ou celui qui veut user et qu'il suffit de ne pas consommer ou user pour n'y être pas assujetti. Ainsi, par exemple, celui qui ne se sert pas de papier timbré et n'use pas de tabac est sûr de ne payer aucune partie des droits établis pour le timbre et sur les tabacs. Il en est de même pour toutes les branches des contributions indirectes." [Favard de Langlade, Repert. V. Contributions Indirectes.]

And Merlin, Repert. V. Contributions Indirectes, says: "On distingue deux sortes de contributions, les contributions directes et les contributions indirectes. Les contributions directes sont établies directement sur les personnes. Les contributions indirectes sont, suivant la définition qu'en donne la loi en forme d'instruction du 8 janvier, 1790, tous les impôts assis sur la fabrication, la vente, le transport et l'introduction de plusieurs objets de commerce et de consommation, impôts dont le produit, ordinairement avancé par le fabricant, le marchand, ou le voiturier, est supporté et indirectement payé par le consommateur. C'est aussi à cette classe qu'appartiennent les droits sur les tabacs, sur les cartes à jouer, sur le sel, sur les boissons," &c., &c. See also De-meunier, Economie Politique, vol. 3, V. Impots.

There cannot be a shadow of a doubt that the duties imposed on the Assurance Companies by the Legislature of Quebec, let them be called licenses or stamp duties, come distinctly within the definition given by the French authors, and should be classed in the category of indirect taxes.

If we now examine the English authors, it is impossible to declare that these duties on the Assurance Companies fall into the category of direct taxes.

"Taxes are either direct or indirect," says Mill. "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. . . . Most taxes on expenditures are indirect, but some are direct, being imposed not on the producer or seller of an article, but immediately on the consumer." (2 Mill, Pol. Econ. p. 415.) See also same volume, pp. 432, 458, 465, 466.

"A direct tax operates and takes effect independently of consumption or expenditure; while indirect taxes affect expenses or consumption, and the revenue arising from them is dependent thereon." 3 Smith's Wealth of Nations, pp. 3, 11 (10th Ed.). Taxes on operation, and those

on commodities, are put in the same category. See Macdonnell—*A Survey of Political Economy*, p. 346. See also 2 Smith's *Wealth of Nations*, by Rogers, pp. 413, 466, and McCulloch's *Principles and Practical Influence of Taxation and the Funding System*, pp. 1 and 242.

In the United States the distinction between direct and indirect taxes is made upon the same principles, as those, upon which the French and English authors above cited make it.

Hilliard—*Law of Taxation*, par. 60—says, a license on particular pursuits is an indirect tax.

In the case of *Loughborough v. Blake* (5 Wheat. 317), Chief Justice Marshall, speaking of the celebrated duties which were the immediate cause of the American rebellion, says, "Neither the Stamp Act nor the duty on tea were direct taxes."

In the *Veazie Bank v. Fenno* (8 Wall. 533), "A direct tax was held to be solely a tax upon land or its appurtenances, or upon polls."

In *Pacific Ins. Co. v. Soule* (7 Wall. 438), an income tax on the premiums assessment, and dividends of an Insurance Company were held not to be a direct tax, but a duty of excise.

The duties imposed by the Legislature of Quebec on the Assurance Companies seem very much to be an indirect tax on the premiums. Moreover, cannot these duties be said to be excise?

What is excise? "Excise is the name given to the duties or taxes laid on certain articles produced and consumed at home; but exclusive of the duties on licenses, auctioneers and post horses, &c., &c., are included in the excise duties." (Wharton Law. Lex. V. Excise.)

McCulloch's Dict. of Com., V. Excise, gives its definition in very much the same terms—"As a part of excise, the rates of duties on licenses are included, as upon auctioneers, brewers," &c., &c. (McCulloch on the Principles and Practical Influence of Taxation and the Funding System, p. 242.) And at page 321, "The licensing of lotteries is also a mode of raising a revenue by indirect taxation." In fact, all authors agree in placing excise duties in the category of indirect taxes.

Another author in the United States says: "Taxes are usually divided into direct and indirect. The former include assessments made upon the real and personal estate of the tax-payer, upon his income, or upon his head. The latter comprise duties upon imports and exports, excises, licenses, stamp duties, and the like." (Ripley's Amer. Cyclopaedia, V. Taxes.) It would seem that even in the British North America Act, the legislator did not consider that licenses were a direct tax. Had it been the intention to consider licenses as a direct tax, it

would not have been necessary, after having given to the Local Legislature, by sub-sec. 2, the power to impose direct taxes, to have repeated in the 9th sub-sec. that the right to impose licenses on certain subjects was also within the legislative authority of the Provincial Legislatures. Does not the Act in so many words declare that the Local Legislature will have power to impose direct taxation, but as to indirect taxation, its power is limited to "shop, saloon, tavern, auctioneer, and other licenses."

In the case of *Regina v. Taylor* (36 U. C. Q. B. 217), all the Judges composing the Court of Queen's Bench, as well as those of the Court of Error and Appeal, to wit: C. J. Draper and Richards, and Justices Morrison and Wilson, Strong, Burton, and Patterson, were of opinion that a license to be paid for by a brewer, or by a person to sell by wholesale, was an indirect tax. In the present case the character of the tax seems still more clearly established to be an indirect tax. For all these reasons, the tax imposed on the Insurance Companies is not a direct tax, and, therefore, under sub-section 2 of the 92nd section of the British North America Act, the Local Legislature had no power to impose it. On this point there is no difference of opinion amongst us.

Moreover, it was not on the 2nd sub-section that the Legislature relied in order to pass this Statute in reference to Insurance Companies, or that they supposed that they were for the first time, thereby imposing, a direct tax in the Province of Quebec. The 9th paragraph of the 92nd section is alone relied on, as giving the Legislature authority to pass this Statute. This is the sub-section which gives to the Local Legislatures control over "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." And it is principally in the words "and other licenses" that the power to impose this tax on Insurance Companies is said to exist.

Let us see if by the words "and other licenses" the legislative provincial authority is thereby so very much enlarged.

It is clear, on the simple reading of the Quebec Act, that the formality of taking out the license was thought of, in order, that the intended legislation would come within the authority of this 9th sub-sec. of the 92nd section of the Imperial Statute. Nevertheless it is a "stamp duty" that has, in reality, been created. For, although there is a penalty of \$50 imposed in case of policies, or renewal receipts, issued without the required stamps affixed, yet we do not find any penalty imposed if an Insurance Company does not take out the license.

If the Company defendant in the case, The Queen's Insurance Co., had affixed stamps on its insurance policies, it would not have been subjected by the Statute to any penalty for having refused or neglected to take out a license from the revenue officer.

The Act, it is true, enacts that each company shall take out a license, but this license is not for the purpose "of the raising of a revenue for provincial, local, or municipal purposes." The dollar which is charged, as the cost of, or price of the license, is a fee which is paid personally to the revenue officer. Now, by the express terms of the Imperial Statute, it can only be for "the raising of a revenue, for provincial, local, or municipal purposes," that a license may be imposed.

If, as in the present case, the license does not raise any money for any of these purposes, the Legislature of the Province has no power to impose it, and the Statute imposing it must be declared *ultra vires*.

An Insurance Company need not take out any license, and thereby will not be subject to any penalty under this Statute—provided the policies and renewal receipts have stamps affixed, the object of the legislation has been attained. How can it be said that in such a case the license has produced a revenue when it is not even in existence?

Now, by the express terms of the Imperial Statute a license can be imposed only in order to raise a revenue, while, on the face of the Statute under consideration, the license which the companies are to take out cannot and could not produce a revenue. The result is that this legislation is not authorized by the Imperial Statute.

Let us consider this case in its most favorable light for the Provincial Legislature—by admitting that the duties imposed are really license duties payable in stamps, on the transactions of the Insurance Companies.

Let us see whether the Legislature of Quebec had authority to pass such a law. First, can insurance companies be comprised in the words "and other licenses" which follow the words "shop, saloon, tavern, auctioneer," in sub-section 9 of section 92 of the Imperial Act. That is the question. A well-known rule of construction of Statutes will solve this question. It is the rule which declares that "general words will be restrained to things of the same kind with those particularized." Under this rule it cannot be contended that Insurance Companies are comprised in the three words "and other licenses" of the Imperial Statute, for it cannot be said that they are *ejusdem generis* as "shop, saloon, tavern, auctioneer," which precede the words "and other licenses." This rule has been adopted in the United States as well as

in England, and it has been held that a Statute which speaks of auctioneers, &c., and all other trades, avocations, or professions, whatever, does not include lawyers: Sedgwick Cons. of Stat. and Cons. Law. This rule is based on common sense, which naturally leads one's mind to think first of the most important subjects comprised in a subject matter with which it may be occupied. Is it reasonable to think that the legislator would have enumerated specially "shop, tavern," &c., and would have left Insurance Companies as being comprised in the words "and other licenses." If it had been intended to give to the Provincial Legislature no authority to license insurance companies, would they not have been specially mentioned? There is no doubt they would have been named the first of all.

And what would naturally have struck the mind of the Legislature at the time, in order that they might not be unintentionally omitted, is that Insurance Companies by law were then obliged to take out licenses: 23 Vict. ch. 33, 1860; 26 Vict. ch. 43, 1863. (See also 38 Vict. ch. 20, and 40 Vict. ch. 42.)

They are much more important than "shop, tavern, &c.," which have been particularly mentioned, and the Legislature cannot have intended, by adding the words "and other licenses," to have included in these words the power to tax institutions or industrial concerns which are so much superior to those mentioned immediately preceding these words.

This was the view taken in the case of *The Archbishop of Canterbury* (2 Coke's Rep. 46). "A Statute treating of persons or things of an inferior rank cannot by general words be extended to those of a superior." This rule is applicable to every section of an Act, unless the contrary appears from the context of the whole Act. Now, by referring to the Imperial Statute I find, in reading the whole Act, that, far from being unable to make the application of this rule to this section, it is evident, more especially so by referring to the 91st section, which regulates the legislative powers of the Federal Parliament (a clause to which I will more particularly refer hereafter) that the words "and other licenses" mean and are intended to include "and other licenses" of the same kind, *ejusdem generis*. In the case of *Sandiman v. Breach* (7 B. & C. 96) it was held, "where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned." See also Dwaris, 656, and Maxwell on Statutes, 297.

Another consideration which strikes my mind, is, that if Insurance Com-

panies are comprised in the words "and other licenses," then the banks, railroad companies, and express companies, are also comprised in these words, and if all these large companies could be compelled to take out licenses, then the Provincial Legislature would have power to impose stamp duties on promissory notes, bank shares, cheques, and on every ticket issued by a railroad company, and on bills of lading signed by express companies. The Legislature would also have the power to compel notaries to take out licenses, and to impose a stamp duty on each and every deed they would pass. In fact, the power to tax indirectly would be unlimited. With the words "and other licenses," a stamp duty could be imposed on all things that might be made subject to the taking out of a license.

The revenues of the Local Governments could thereby be largely increased, and direct taxation would, no doubt, be avoided for a long time.

Can the Constitution have intended this? I do not think so, and in support of my opinion I will take the liberty of referring to the history of our Constitution, and of citing two or three extracts from the discussion which took place in our Parliament at the time of the debates on Confederation. It is well known that, although the British North America Act is an Imperial Statute, it was on the Quebec resolutions previously adopted that the Act was founded, and that the important debates on this project took place in Canada. It is true that numerous alterations were made in England to the resolutions passed by the Canadian Legislature; but when I compare the resolutions with the Imperial Statutes, I find that the clauses having reference to the distribution of legislative powers between the Parliament of the Dominion and the Local Legislatures, were not materially altered. So that what was said in the Canadian Parliament on these clauses may be considered as applicable to the sections of the Imperial Act now under consideration.

At page 94 of the Debates on Confederation, one of the speakers, after having spoken in reference to the subsidy to be given by the Federal Government to the Local Governments, adds: "If this, from any cause, does not suffice, the Local Governments must supply all deficiencies from direct tax on their own localities." And at pp. 384, 385 another speaker seems also to be clearly of opinion that the sources of revenue for the Province of Quebec were to be under Confederation those which existed at that time, and previously, and that the only mode of increasing the revenues would be by direct taxation. At pp. 67,

68, 69, a third speaker, uses very clear and unambiguous language on this point. The fact that this person was at the time Minister of Finance for Canada adds very much weight to his remarks, when the question under consideration was to provide for the financial position of the Provinces under the proposed scheme. I will give the following extracts:

“I now propose, sir, to refer to the means which will be at the disposal of the several Local Governments to enable them to administer the various matters of public policy which it is proposed to entrust to them.”

“It will be observed that in the plan proposed there are certain sources of local revenue reserved to the Local Governments, arising from territorial domain, lands, mines, &c., &c. In the case of Canada, a large sum will be received from these resources; but it may be that some of them, such as the Municipal Loan Fund, will become exhausted in the course of time. We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain, our valuable mines, and our fertile lands, additional sources of revenue far beyond the requirements of public service. If, nevertheless, the local revenues become inadequate, it will be necessary for the Local Governments to have resort to direct taxation.” It is evident the speaker was not of opinion that Local Legislatures would be able to dispense with direct taxation by means of license duties. Further on he says, “The House must now, sir, consider the means whereby these local expenditures have to be met. I have already explained that in the case of Canada, and also in that of the Lower Provinces, certain sources of revenue are set aside as being of a purely local character, and available to meet the local expenditure, but I have been obliged in my explanations with regard to Canada to advert to the fact that it is contemplated to give a subsidy of eighty cents per head to each of the Provinces. In transferring to the General Government all the large sources of revenue, and in placing in their hands, with a single exception—that of direct taxation—all the means whereby the industry of the people may be made to contribute to the wants of the state, it must be evident to every one that some portion of the resources thus placed at the disposal of the General Government must, in some form or other, be available to supply the hiatus that would otherwise take place between the sources of local revenue and the demands of local expenditure.”

By stating that “all the large sources of revenue, with the exception of direct taxation, were to be transferred to the General Govern-

ment," the speaker could not have had the intention of giving to the Local Legislatures the large powers of licensing which the Quebec Legislature claims to have in the present case.

No doubt, the Imperial Statute must, as any other statute, be construed by itself, and the opinions I have referred to are not legal authorities. But can we not look at them in order to interpret this statute? And it is to be borne in mind, in referring to the history of our Constitution, that these persons whose opinions I have cited formed part of the preliminary conference where the resolutions on Confederation were framed. Can it be said that a commentary of a law by the author of that law should have no weight?

In France, do we not continually see commentators and text writers, in order to construe the text of the Code Napoleon, refer to the speeches made by Cambaceres, Freiluard, Bigot de Preameneu, Comte de Portales, and others made during the discussion of the subject in the Council of State, at the Tribune, and in the Legislative Assembly.

I, therefore, come to the conclusion that the Local Legislatures, under the Imperial Statute, have only authority to impose an indirect tax on shop, saloon, tavern, auctioneer and other licenses *ejusdem generis*, and that Insurance Companies, not being *ejusdem generis*, as shop, &c., cannot be subjected to an indirect tax imposed by Local Legislatures.

So far I have not taken into account the commercial character of Insurance Companies. I have tried to find in the Imperial Act a power given to the Local Legislatures, by way of exception, to impose *indirect taxes* by license duties on any industry (commercial or non-commercial), occupation, trade, profession, other than on "shop, saloon, tavern, auctioneers," and others of the same kind, *ejusdem generis*, but I have not found such a power. It would not be necessary for me to add anything, for, as I have already remarked, I am of opinion, that as the power has not been given to the Local Legislatures, it comes within the legislative authority of the Federal Parliament, although, by section 91, it may not have been particularly and specially given. But I will go one step further, and taking into consideration that the respondents' company (and all similar companies) is a commercial company, and that its contracts are entirely of a commercial character; (C. C. 24, 70), I find that by the Imperial Statute these companies and such companies, in express and clear terms, are subject to the legislative authority and are under the exclusive control, of the Federal Parliament. Sub-sec. 2 of the 91st section enacts, that the Federal Parlia-

ment will have power to make laws relating to "the regulation of trade and commerce." The Insurance Companies being commercial companies are therefore under the power of the Federal Parliament. It has not been contended by the Attorney-General of the Province of Quebec that the Federal Parliament had not legislative authority over these companies, but it was apparently urged that the Local Legislatures had a concurrent power, or rather, if I am not mistaken, it was admitted that the Local Legislatures could not regulate these companies, but that they had the power to oblige them to take out a license for the purpose of raising a revenue, and this was not to *regulate* them; and that in the present case it had not been the intention to *regulate* the trade of these companies, but the intention of the Legislature of Quebec was to raise a revenue. I am ready to admit that the intention of the Legislature was to raise a revenue, but is not this legislation virtually "a regulation of trade and commerce," and in one of its most extensive and largest branches? First, a duty is imposed on the companies to take out a license, and to be continually doing business under license. What is a license? It is a permit,—leave granted. What is the origin of the word? Undoubtedly *Licet*, *licere*, to grant leave. Now, in order to grant leave, you must have power to prohibit. He who can grant leave, must first of all have authority to prohibit. Now, I am certain the Legislature of Quebec will not contend they have power to prohibit or prevent Insurance Companies from doing business in the Province. It is true this legislation does not prohibit them, but it has imposed upon them certain conditions. The law says, "Before you can do any business in our Province you must first obtain our leave." Can it be said this is not regulating? The law also says, "If you do not comply with certain formalities, your policies and your receipts will be null and void." Is this not regulating them, in fact, is it not assuming the power to prevent them from doing business?

The defendant company has obtained from the Federal Government the license—the leave—to do business in the Province of Quebec. In order to get the license, they have deposited \$15,000, and they have paid, and pay jointly with other companies, an annual tax to the Dominion of \$8,000, and have complied with all the provisions of the Dominion Statute, 38 Vict. c. 20. But it is contended that all this does not even give it authority to issue a single policy. The Province of Quebec steps in and says, "If under your license from Ottawa, you issue a single policy, or receipt, we enact they shall be null unless you submit to the conditions we impose upon you." They say, "We might, not-

withstanding your license from Ottawa, expel you from the Province of Quebec, and prevent you from carrying on your trade, but we will permit you, but on these conditions." I do not think the Province of Quebec has such powers, first, because they are not given by the 92nd section of the Imperial Statute, and consequently belong to the Federal Parliament; and secondly, because they are given specifically, by the 91st section, under the words "regulation of trade and commerce," to the central power. No doubt, as it has been very properly remarked by the counsel representing the Attorney-General, a literal interpretation of these two sections would make them contradictory on some points.

The 91st section declares that the Federal Government shall have power to tax in every possible mode—and this includes direct taxation.

The 92nd section declares that the Local Legislature has exclusively the power of direct taxation. A literal interpretation of these two sections would make them contradictory. It has been stated somewhere that in order to reconcile these two sections, the word "exclusively" must be construed as referring to the Imperial power. I do not concur in this view, the word was taken from the resolutions on Confederation sent from Canada, and it was certainly not the intention of referring them to the Imperial power. I prefer to admit that there is a contradiction in the letter of the Statute, and construe the sections as giving the power of direct taxation both to the central and local power, and this is in accordance with the well-known rule "where a general intention is expressed in a Statute and the Act also expresses a particular intention incompatible with the general intention, the particular intention shall be considered as an exception:" Per Best C. J. in *Churchill v. Crease*, 5 Bing. 480–492. It is true that by the 91st section the Federal Parliament has, exclusively, the power to tax in every mode, but sec. 92 gives specifically to the Local Legislatures the power of direct taxation. Then according to the above rule, direct taxation, must be considered by section 92 as being excepted from the monopoly given in general terms by the 91st section to the Federal Parliament. The same rule is applicable to the construction of the other paragraphs of these two sections. Thus, although by the 91st section the Federal Parliament has the exclusive power of taxing in every mode, and of regulating trade and commerce—shop, saloon, tavern, auctioneer licenses and other licenses of the same kind come within the jurisdiction of the Local Legislatures, and that, because the power is given specifically by the 92nd section, and *vice versa*. Although the

92nd section gives the power of direct taxation and of indirect taxation by means of the licenses just mentioned, the Federal Parliament has also the power of direct taxation and indirect taxation, by means of said licenses, because the 91st section gives them the power specifically of imposing all kinds of taxes, which is one of the essential elements of sovereignty, and at the same time giving an exclusive control over the regulation of trade and commerce. The concurrent legislative authority over these subject matters, by the Federal Parliament and the Local Legislatures, can only exist as to direct taxation and the granting of "shop, saloon, tavern, auctioneer and other licenses," *ejusdem generis*. It is not, however, necessary for me to consider in this cause the different questions which may arise from the concurrent powers given to these legislative bodies, as I am of opinion, for the reasons I have before given, that the licenses imposed on the insurance companies cannot be said to be a direct tax, and are not comprised in the words "shop, saloon, tavern, auctioneer, and other licenses."

It was stated on the argument that municipal taxes are in a somewhat similar position to these. Without wishing to express an opinion in one sense or the other, as to the constitutionality of any legislation relating to the municipal system, I will say that it is quite possible that such legislation would come within a different class of subject matters and within certain other sections of the Imperial Statute, which I have had occasion to refer to. I allude to the 129th section, which declares that the existing laws before Confederation in each Province shall continue to remain in force, and gives power to the Dominion Parliament and to the Local Legislatures to repeal, alter or modify them according to their respective jurisdiction, as well as by paragraph 8 of the 92nd section, which puts the municipal system under the control of the Local Legislatures. But it is not necessary for us to express any opinion on this portion of the Imperial Statute.

By this suit, the Attorney-General for the Province of Quebec, *pro Regina*, claims from the defendant's company a penalty of one hundred and fifty dollars for issuing three insurance policies without having affixed to them the stamps required by the Statute passed by the Legislature of the Province of Quebec. The Superior Court has decided that this Act passed by the Legislature of Quebec is unconstitutional, and has dismissed the plaintiff's action. This judgment ought to be confirmed, and is confirmed.

On appeal to the Privy Council, their Lordships held, that a License Act by which a licensee is neither compelled to take out nor to pay for a license, but which merely provides :—

That the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, without declaring whether it shall be paid by the licensee or the person who deals with him—is virtually a Stamp Act and not a License Act.

That, as a Stamp Act, the imposition by a Provincial Legislature of a stamp duty on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of law if the stamp is not affixed, is not warranted under sect. 92, ss. 2 of the B. N. A. Act of 1867, which authorizes the imposition of direct taxation only.

In the Privy Council their Lordships said:—

It was alleged, on behalf of the appellants, that, though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet, that it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms, and that therefore in construing the Dominion Act we ought to construe it with reference to this other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations; it was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. But this, is not a payment depending in that sense on the amount of trade previously done by the trader; it is a payment on every transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal, or receipt. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation.

All that it is necessary for them to say is, that, finding these words in an Act of Parliament, and finding that all their known definitions, whether technical or general, would exclude this kind of taxation from

the category of direct taxation, they must consider it was not the intention of the Legislature of England to include it in the term, direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

Ex parte Byrne (2 Pugs. 125), Held by the S. C. of New Brunswick :

That an agent or manager of a Foreign Telegraph Company or Corporation doing business in the Province was liable under a Provincial Act, to assessment on the amount of tolls or income received by him.

That, while the Local Legislature could not incorporate companies for such purposes, there is nothing in the B. N. A. Act to prevent them bearing their share of the burdens of the County.

In *Lawlers v. Sullivan* (2 Can. S. C. 117), Held :

That under the Acts of the Provincial Legislature relating to the assessing of rates and taxes in the City of Saint John, and providing that foreign banking corporations doing business in Saint John are to be assessed "upon the amount of income received," that such corporations are liable to be taxed on the gross income received by them during the fiscal year.

Hon. E. Irvine, Proc. Gen. & Le Maire et Conseil de la ville d'Iberville, 6 R. L. 241 (C. S. 1874), Jugé :

Qu'une Corporation de ville, incorporée en vertu d'un acte spécial de la Législature, n'a pas le droit de passer règlement ou résolution à l'effet d'exempter de taxe les compagnies manufacturières, qui voudront exploiter leur industrie dans ses limites, si ce pouvoir ne lui est pas conféré par l'acte d'incorporation.

United States Decisions.

In *Woodruff v. Parham* (8 Wall. 123), Held :

That a uniform tax imposed by a State on *all* sales made in it, whether made by one of its citizens or by a citizen of another State, and whether the goods sold are the produce of the State enacting the law or of some other State, is valid.

In *State Tax on Foreign-held Bonds* (15 Wall. 319), Held :

That unless restrained by provisions of the Federal Constitution, the Power of the State as to the mode, form and extent of taxation is

unlimited, where the subjects to which it applies are within her jurisdiction.

In the *Case of the State Freight Tax* (15 Wall. 232), Held :

That a Statute of a State imposing a tax upon freight taken up within the State and carried out of it, or taken up without the State and brought within it, is unconstitutional.

State Railroad Tax Cases (92 U. S., S. C., 576) :

The Constitution of Illinois required taxation in general to be uniform and equal, but provided in express terms that a large class of persons engaged in special pursuits, to wit : peddlers, auctioneers, brokers, bankers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, may be taxed as the Legislature shall determine, by a general law uniform as to the class upon which it operates.

Held, that under this provision a Statute is not unconstitutional which provides a different rule of taxation for railroad companies than that for individuals.

Pecte v. Morgan (19 Wall. 581), Held :

That a State cannot, in order to defray the expenses of her quarantine regulations, impose a tonnage tax on vessels owned in foreign ports, and entering her harbors in pursuit of commerce.

In *Henson v. Lott* (8 Wall. 148), it was held :

That a Statute of Alabama imposing a tax upon the sale of spirituous liquors within its limits and subjecting all to the same taxation, without discriminating against the products of other States, was not repugnant to the U. S. Constitution.

§ 3. The Borrowing of Money &c.

In *Morris Ranger v. The City of New Orleans*, the U. S. Supreme Court, in a judgment rendered on the 31st March, 1879, decided :

That—though the power of taxation is a legislative prerogative—when authority to borrow money or to incur an obligation to carry out any public object is conferred upon a municipal corporation by the Legislature, the power to levy a tax for its payment or the discharge of the obligation accompanies it, although no such power is delegated in express terms.

The litigation arose out of an application for a writ of mandamus to compel the authorities of that city, to levy a tax, to pay certain judgments rendered against it upon bonds issued to the New Orleans, Jackson, and Great Northern Railroad Company. The city set up as a defence that there was no legislative authority, for the levy of such a tax. The petitioner demurred to this answer, but the Circuit Court overruled the demurrer and denied the writ, whereupon the petitioner took this appeal. The Court below proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the Government, and that the judiciary cannot direct a tax to be levied when none is authorized by the Legislature.

Justice Field, who delivered the Judgment of the Court, said :

When the Legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that its payment shall not be left to its caprice or pleasure. Whenever a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words of limitation. In the present case the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. Owing the debt, the city had the power to levy a tax for its payment, and it was clearly its duty so to do. The payment was not a matter resting on its pleasure, but a duty to the creditor, and having neglected that duty, a mandamus should have been issued to enforce its observance. The judgment of the lower court must therefore be reversed, and the cause remanded, with directions to issue the writ in compliance with the petition.

§ 8. Municipal Institutions in the Province.

In *Loan Association v. Topeka* (20 Wall. 55), Held :

That a Statute which authorizes a town to issue bonds in aid of manufacturing enterprises of individuals, is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for the public use, in the proper sense of that term.

§ 9. Shop, Saloon, Tavern, Auctioneer, and other Licenses &c.

In *Levesque and The City of Montreal* (2 L. N. 306). Levesque was sentenced to pay a fine of \$40 for carrying on his trade of a butcher in violation of certain By-laws of the City prohibiting the sale of fresh meat (and other

articles usually sold on the markets) within 500 yards of a public market established by the City, and without a license.

The City Council claimed the power to pass the by-laws under an Act of the Provincial Legislature (37 Vict. c. 51).

On the part of Levesque it was contended that these by-laws were *ultra vires*; that the City Council could acquire no power from the Provincial Legislature to regulate the trade of a butcher by fixing a limit within which he could not carry on his trade, and by imposing a license tax on his business.

On certiorari, asking for the quashing of the sentence, the conviction was affirmed, the Court holding:—

That the by-laws were not *ultra vires*; that the City Council were duly authorized by the Legislature to pass the by-laws in question, and that the Legislature had power to regulate the trade of a butcher by prohibiting its exercise within certain limits of the public markets.

In *Mallette et al. v. City of Montreal* (2 L. N. 370), S. C. Montreal, The plaintiffs were butchers upon whom the City imposed, in addition to a business tax, a license tax of \$200 each for carrying on their trade within the city, but outside of the public markets.

They brought their action to have the license tax declared null and void and to have the City perpetually enjoined from collecting such a tax on the grounds:

First.—That the by-laws were *ultra vires* of the City, as, under the power of taxation delegated to the Provincial Legislature under sec. 92 of B. N. A. Act, no power is conferred upon the city to exact a license tax after having imposed a business tax, in violation of the rule that no person ought to be twice taxed for the same object.

Second.—That the by-laws were *ultra vires*, as being a violation of the principle of equality of taxation, being a discrimination in favor of the market butchers who rent stalls from the City in the public markets and pay no tax in addition to their rent.

Third.—That, even assuming the by-laws to be a matter of police regulation, they were unreasonable and inequitable regulations and an injurious and unlawful restraint of trade.

Fourth.—That the imposition of a license tax of \$200 on a particular trade, in addition to a business tax, is a *regulation of trade* which, by the B. N. A. Act, 1867, is to be exclusively regulated by the Dominion Parliament and is *ultra vires* of the local Legislature.

Fifth.—That the imposition of a license tax upon persons, not tenants of the City, carrying on a particular trade, and the imposition of no tax upon the tenants of the City engaged in the same trade, is a discrimination which is unconstitutional, and amounts to a regulation of

trade, and all legislation thereupon by the B. N. A. Act, sec. 91, ss. 2, belongs exclusively to the Dominion Parliament.

Mackay, J., in delivering judgment said :—

The by-law referred to reposes on an Act of the Quebec Parliament passed since Confederation, and has several times been attacked, particularly in the case of the *Attorney General v. The City*, decided in 1876 by Mr. Justice Johnson, when the Attorney General's petition was dismissed.

"The trade and commerce of the Dominion," said Mr. Justice Johnson in that case, "is a very distinct thing from the individual trades or callings of persons subject to municipal government in cities;" and he went on to observe, that the Provincial Legislatures had a right to make laws in relation to municipal institutions, and also in relation to shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local and municipal purposes; and found the licenses required of butchers, to be imposed to raise revenue for the city and that they are not unlawful.

I look upon the by-law as partly a regulation of police, and partly a by-law to make revenue for city purposes, by the way or in the form of licenses. I consider it well founded.

I consider the by-law complained of reasonable, nor do I see it work inequality of taxation in a bad sense.

All the butchers can enjoy equally the advantages of the public markets. If they chose to have private stalls in the city, all those who may prefer that, are equally taxed. The two classes of butchers are respectively on a par footing. The by-law is, therefore, upheld and the action dismissed.

In *ex parte Fairbairn* (2 Pugs & Burb. 4), Held :

That the New Brunswick Acts authorizing the Mayor of Fredericton to exact a license tax of \$100 from any person, not being a rate-payer, in the City or County, wishing to engage in any trade, profession, occupation or calling within the city, are not *ultra vires* as being an interference with trade and commerce, but that this legislation is within the power of the Provincial Legislature under sec. 92, ss. 9, of B. N. A. Act.

Allen, C. J., in delivering the judgment of the Court, said :

The effect of requiring commercial travellers (so-called) to take out licenses to enable them to carry on their business, is that they shall contribute to the local revenues in like manner as the residents

of the place contribute to the revenues, by the payment of taxes. We cannot see how this is any greater interference with trade or commerce than the requiring a person to take out a license to sell liquors, or a license to sell goods as an auctioneer.

In *Ward v. State of Maryland* (12 Wall, 418), Held :

That a license tax imposed under a State Statute exacting a larger amount from persons not permanent residents of that State before selling or offering for sale within the limits of the city of Baltimore, certain goods, wares and merchandise, was repugnant to the United States Federal Constitution.

In *Regina v. The Justices of King's* (2 Pugs. 535), Ritchie, C. J., in delivering the judgment of the Court, said :—

We by no means wish to be understood that the Local Legislature have not the power of making such regulations for the government of saloons, licensed taverns, &c., and the sale of liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting, or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate ; but if, outside of this, and beyond the granting of the licenses before referred to, in order to raise a revenue for the purposes mentioned, the Legislature undertakes directly or indirectly to prohibit the manufacture or sale, or limit the use of, any article of trade or commerce—whether it be spirituous liquors, flour, or other articles of merchandize—so as actually and absolutely to interfere with the traffic in such articles, and thereby prevent trade and commerce being carried on with respect to them, we are clearly of opinion *they assume to exercise a legislative power which pertains exclusively to the Parliament of Canada.*

As to the construction of the words "and other licenses."

In *Brown v. The Curate, &c., of Montreal* (44 L. J., P. C., p. 9—23 W. R. Digest, p. 36—L. R. 6 P. C. 169—20 L. C. J. 228), their Lordships of the Privy Council held :

That the force of the words *et cetera* must be confined to cases *ejusdem generis* as those specified.

And in this case, on giving their decision in favor of the widow of Joseph Guibord, on the question of the right of Guibord to interment

in the ordinary way in the cemetery of his Parish, their Lordships declared that they would be governed by the principles enunciated in the case of *Long v. The Bishop of Cape Town* (1 Moore N. S. 460), and that they were therefore bound to inquire whether the act of the Bishop in refusing ecclesiastical burial, was in accordance with the law and rules of discipline of the Roman Catholic Church, which obtain in Canada, and they then proceeded to say: "It seems, however, to be admitted on both sides that the law upon the point in dispute is to be found in the Quebec ritual . . . and that the cause of refusal finally insisted upon was that Guibord was *un pécheur public* within the meaning of the 8th rule."

The portion of this rule referred to as applicable reads as follows :

8. Aux pécheurs publics qui seraient morts dans l'impénitence ; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers, etc.

Their Lordships then proceeded to inquire as to the force of the term "etc." or *et cetera*, and said :

What is this category of "pécheurs publics" to include ? Is the category capable of indefinite extension by means of the use of an *et cetera* in the Quebec Ritual ? Or if the force of an *et cetera* is to be allowed to bring a man within the category of persons liable to what, in ecclesiastical law, is a criminal penalty, must it not be confined to offences *ejusdem generis* as those specified ? Guibord's case did not come within any of the enumerated classes.

Some argument was raised as to the effect of the words, "*quand il y aura quelque doute sur ces sortes de choses les Curés nous consulteront ou nos grands Vicaires*," but their Lordships are of opinion that these words can at most imply a duty on the part of the Curé to consult the ordinary as to the application of the law, in doubtful cases, not a power on the part of the ordinary to enlarge the law in giving those directions, or to create a new category of offenders.

To allow a discretionary addition to, or an enlargement of, the categories specified in the Ritual, would be fraught with the most startling consequences. For instance, the *et cetera*, might be, according to the supposed exigency of the particular case, expanded so as to include within its bann, any person being in habits of intimacy or conversing with a member of a literary society containing a prohibited book ; any person visiting a friend who possessed such a book ; any person sending his son to a school in the library of which there was such a book ; going

to a shop where such books were sold ; and many other instances might be added. Moreover, the Index, which already forbids Grotius, Pascal, Pothier, Thuanus and Sismondi, might be made to include all the writings of jurists and all legal reports of judgments supposed to be hostile to the Church of Rome ; and the Roman Catholic lawyer might find it difficult to pursue the studies of his profession.

Their Lordships are satisfied that such a discretionary enlargement of the categories in the Ritual, would not have been deemed to be within the authority, by the law of the Gallican Church as it existed in Canada before the cession ; and, in their opinion, it is not established that there has been such an alteration in the *status* or law of that Church founded on the consent of its members, as would warrant such an interpretation of the Ritual, and that the true and just conclusion of law on this point, is, that the fact of being a member of this Institute, does not bring a man within the category of a public sinner to whom Christian burial can be legally refused.

Gouinlock v. Manufacturers and Merchants Mutual Fire Ins. Co. of Canada (15 U. C., L. J., N. S., 27) :

To the question contained in an application for insurance, " For what purpose are the premises occupied ? " the answer was, " dwelling, &c."

Held, that this meant " dwelling *et cetera*," and that the applicant thereby gave notice that the premises were otherwise occupied for another purpose also—which it appeared was as a drinking saloon.

United States Decisions.

In *Munn v. State of Illinois* (94 U. S., S. C., 113), Held :

That a State Legislature has power to fix the maximum rates to be charged for the storage of grain in elevators, notwithstanding they are used as instruments of commerce, by those engaged in inter-State as well as in State commerce. Such regulations can be enforced until Congress enacts conflicting regulations.

Waite, C. J., in delivering the opinion of the Court, said :

Under the powers inherent in every Sovereignty, a Government may regulate the conduct of its citizens towards each other, and, when necessary for the public good, the manner in which each shall use his own property.

It has in the exercise of these powers been customary in England from time immemorial to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a

maximum of charge to be made for services rendered, accommodations furnished, and articles sold.

In *Chicago, Burlington & Quincy R. R. Co. v. State of Iowa* (94 U. S., S. C., 155), Held :

That a State Legislature has power to fix the maximum rates to be charged for the carriage of passengers and goods by a Company whose railroad is located within the limits of the State, and that until Congress acts a State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction.

Thurlow v. Massachusetts,—Fletcher v. State of Rhode Island,—Pierce v. State of New Hampshire (License Cases), 5 How., 504, Held :

That the Laws of Massachusetts forbidding the sale of spirituous liquors in a less quantity than 28 gallons are not inconsistent with any of the provisions of the Constitution of the United States. Same decisions as to Laws of Rhode Island and New Hampshire imposing similar restrictions.

In *Doyle v. Continental Insurance Co.* (94 U. S., S. C., 535), Held :

That a foreign corporation has no constitutional right to transact business in a State as against State legislation prohibiting it, and as the State has the right to exclude it, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry, and that, therefore, a State may compel a foreign Corporation, to take out a license.

Mr. Justice Bradley, Mr. Justice Swayne and Mr. Justice Miller dissented.

Mr. Justice Bradley, who delivered the dissenting opinion, said: Though a State may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. The conditions of society and the modes of doing business in this country are such, that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort requiring large capital. They can only be successfully carried on by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of

those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average, and the needs of the country require that corporations—at least those of a commercial or financial character—should be able to transact business in different States.

In *Bartemeyer v. State of Iowa* (18 Wall. 129), Held :

That as a measure of police regulation a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution.

This decision was followed in *Beer Company v. State of Massachusetts* (97 U. S., S. C., 25).

§ 10. Local Works and Undertakings other than such as are of the following Classes :—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province :

b. Lines of Steam Ships between the Province and any British or Foreign Country :

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of CANADA to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

On the 4th December, 1874 (Sess. Papers, 1877, No. 89, p. 87), the Minister of Justice concurred in a report of his Deputy advising the Governor General to disallow an Act of the Nova Scotia Legislature incorporating certain persons under the name of The Anglo-French Steamship Company, for the purpose of running a steamer or steamers to and from ports in Nova Scotia, the Island of St. Pierre Miquelon and Newfoundland, on the ground that it was shown on the face of the Act that it incorporated a line of steamships extending beyond the limits of the Province and between the Province and a British port, as also a foreign country, and that it obviously came within one of the classes mentioned in the B. N. A. Act, sec. 92, ss. 10, classes *a* and *b*.

On the 25th March, 1875 (Sess. Papers, 1877, No. 89, p. 84), the Minister of Justice concurred in a report of his Deputy advising the disallowance of another Act of the same Legislature (N.S.), c. 82 of 1874, entitled "An Act to incorporate the Eastern Steamship Company," which stated that the

Company would be entitled to run steamers on the coast of the Province and *elsewhere*, disallowance being suggested for the same reason as above.

In *Bourgoin v. La Compagnie du Chemin de Fer de M. O. & O.* (3 L. N. 189), Held by the Privy Council:

That a Railway Company, incorporated by the Dominion Parliament, cannot be validly authorized to dissolve, by an Act of a Provincial Legislature.

The Montreal, Ottawa and Western Railway Company having been declared, by 36 Vic. c. 82 (Canada), to be a work for the general advantage of Canada, made a transaction with the Quebec Government, on the 16th Nov., 1875, by deed, in which, after reciting the nature of the enterprise and the commencement of the work; and that the Company was unable to proceed further with the construction of the Railway; and that the Government of Quebec was willing to assume and complete the construction of the said Railway, and for that purpose to acquire from the Company all its rights and assets, and to take upon itself the legitimate liabilities of the Company; and that in consideration thereof the Company had agreed to transfer and convey such rights and assets to the Government, the deed then proceeds to state the covenants and agreements into which the parties had entered into before the notary. By this deed the Company granted, sold and conveyed to the Government all its rights, &c., &c., stating its intention to be, to divest itself of all the property of the said Corporation, transferring to the Government all its interest in the balance of the subscription of bonus to the said Company by the Corporation of Montreal, and by various other corporations, the Government agreeing to pay to certain trustees, upon the confirmation of the deed by the Legislature of Quebec, \$57,149.95, being the amount of the then paid up stock of the Company.

The Legislature of Quebec, on the 24th December, 1875, by Act 39 V. c. 2, confirmed that transaction, and the Government took possession of the Railway and property of the Company.

The appellants having obtained a judgment against the Company, seized under execution the roadway and rolling stock of the Company, then in the possession of the Government.

The Attorney-General for the Province of Quebec opposed the seizure, claiming ownership of all the property seized, alleging the transaction of the 16th November, 1875, and the confirmatory Act 39 V. c. 2, as their title to part of the property seized. This opposition was contested on the ground that the Company being a creature of the

Dominion Parliament, and the transaction not having been authorized by that Parliament, the transaction as well as the Provincial Act 39 V. c. 2 were inoperative and invalid. The Superior Court dismissed the contestation and maintained the opposition of the Attorney General, holding that the nullity of the transaction and of the Act 39 V. c. 2 not having been demanded, the Court could not pronounce these operations null and void.

In the Queen's Bench this judgment was confirmed. But, on Appeal to the Privy Council, the judgment of the Courts below was reformed.

Their Lordships on the 26th February, 1880, after reciting the facts, and especially that part of the Dominion Statute which had made that railway a Dominion enterprise, and disposing of an intervention made by the Attorney General on the same grounds, and of the opposition, said :

"These provisions, taken in connection with, and read by the light of those of the Imperial Statute, 'the British North America Act, 1867,' which are contained in section 91, and sub-section 10 c of section 92, establish to their Lordships' satisfaction, that the transaction between the Company and the Government of Quebec could not be validated to all intents and purposes by an Act of Provincial Legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect. This proposition was finally hardly disputed by the learned Counsel for the respondent, but they relied upon the 8th clause of the deed, and the 46th section of the Quebec Act, as showing that recourse to the Parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited the *Great Western Railway Company v. The Birmingham and Oxford Junction Railway*, 2 Phill. 597, and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the Company, in which category the appellants fell since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully

validated by an Act of the Parliament of Canada, to obtain which no attempt seems ever to have been made.

In their Lordships' opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed."

In *The Wason Manufacturing Co. v. Le Chemin de Fer de Lévis*, etc. (5 Q. L. R. 103), (C. S.) Casault, J.:—

Il n'est jamais venu à l'esprit de qui que ce soit qu'une Compagnie incorporée de Chemin de Fer puisse vendre son chemin de gré à gré, sans une autorisation expresse de la Législature.

In *Credit Valley Railway Co. v. Great Western Railway Co.* (25 Grant's Chanc. 509), Held :

That when it is necessary for a Provincial Railway to cross a Dominion Railway, the Company must first get the approval of the Railway Committee of the Privy Council.

H. E. Taschereau, J., in the *Citizens Insurance Co. & Parsons* (3 Can. S. C. 121), remarking upon the business of telegraphing, said :

Sending a message by telegraph is not a transaction of commerce, yet, telegraph companies, and the right to regulate them, are held in the United States to be under the Federal Power as a part of commerce and this, though a very large proportion of the telegraphic messages have nothing to do with commerce at all. (*Western Union Telegraph Co. v. Atlantic and Pacific States Telegraph Co.*, 5 Nev. 102; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., S. C.) With us, on the same principle, telegraph business would also be exclusively under Federal control, if the British North America Act did not expressly vest in the Local Legislatures the control over local and provincial lines, as long as the Federal Parliament does not declare them to be for the general advantage of Canada.

§ 11. The Incorporation of Companies with Provincial Objects.

An Act passed by the Legislature of Nova Scotia, in 1874, intituled : An Act to incorporate the Halifax Company "limited," giving rights to cross rivers without reference to the rights of Navigation, was disallowed by the Governor General as not being for purely local works or undertakings, nor an Act for the incorporation of a Company with Provincial objects merely, or objects of a merely local or private nature in the Province, but for objects beyond the power and control of a Local Legislature. (Dom. Sess. Papers, 1877, No. 89, p. 86.)

§ 12. The Solemnization of Marriage in the Province.

Upon a report made 29th November, 1869, by Sir John A. Macdonald to the Governor General, the following questions were submitted through the Colonial Minister to the Law Officers of the Crown :

1. Whether the authority to issue Marriage Licenses vested in the Governor General under Her Majesty's Commission or in the Lieutenant Governors of the several Provinces.

2. Whether the power of legislation respecting the publication of banns, or the issue of licenses, rests with the General or Local Legislatures.

In answer to the above, an opinion was given in the following words by the Law Officers of the Crown, transmitted by the Secretary of State for the Colonies, on the 15th January, 1870 :

It appears to them that the power of legislating upon this subject is conferred on the Provincial Legislatures, by 30 Vic. chap. 3, sec. 92, under the words "the solemnization of marriage in the Province." The phrase "the laws respecting the solemnization of marriages in England" occurs in the preamble of the Marriage Act (4th Geo. IV. C. 76), an Act which is very largely concerned with matters relating to banns and licenses, and this is, therefore, a strong authority to show that the same words used in the British North America Act, 1867, were intended to have the same meaning. "Marriage and Divorce," which, by the 91st section of the same Act, are reserved to the Parliament of the Dominion, signify, in their opinion, all matters relating to the *status* of marriage, between what persons and under what circumstances it shall be created and (if at all) destroyed.

There are many reasons of convenience and sense why one law as to the *status* of marriage should exist throughout the Dominion, which have no application as regards the uniformity of the procedure whereby that *status* is created or evidenced.

Convenience, indeed, and reason would seem alike in favor of a difference of procedure being allowable in Provinces differing so widely in external and internal circumstances as those of which the Dominion is composed, and of permitting the Provinces to settle their own procedure for themselves, and they are of opinion that this permission has been granted to the Provinces by the Imperial Parliament, and that the New Brunswick Legislature was competent to pass the bill in question. (Dom. Sess. Papers, 1877, No. 89, p. 340.)

§ 13. Property and Civil Rights in the Province.

The power of making laws relating to the descent and acquisition of property, and the regulation and protection of the "civil rights" of its citizens by proper legislation, is incident to every separate Sovereignty. This power is consequently assigned by this sub-section (and indirectly by sub-section 16 as being among the matters purely local) exclusively to the Provincial Governments.

On this head, it must be remarked that in no part of the B. N. A. Act do we find a limitation to the power of the Legislatures, whether Federal or Provincial, such as is contained in art. 1, sect. 10, 1st clause, of the American Federal Constitution, in the following words: "No state . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

In the case of *Union St. Jacques & Belisle*, the constitutionality of the Quebec statute was attacked on the ground that the *Union St. Jacques* having acknowledged that they were unable to meet their liabilities, and having demanded a compulsory composition with their creditors, the Provincial statute granting that demand amounted to legislating on insolvency. The Privy Council did not agree with that contention and found the statute constitutional. But if the limitation of the U. S. Federal Constitution not to pass any law *impairing the obligation of contracts* had been part of the B. N. A. Act, it is more than likely that all our courts would have agreed in declaring the statute unconstitutional. This remark will apply to many other decisions affecting property and private rights.

In *re Goodhue* (19 Grant's Ch., p. 372) :

The Legislature of the Province of Ontario passed an Act, (34 Vict. C., 99,) altering a will after the death of the testator, the will having been made in the full exercise of the rights and powers of the testator and in strict accordance with the law.

On appeal, to the Court of Error and Appeal, the Judges agreed (although divided on other points of the case) that the Provincial Legislature had power to pass such an Act so far as affects property real and personal which was actually in the Province at the time of the passing of the Act; that, conceding to the fullest extent that the powers of the Legislature of Ontario are defined and limited by the British North America Act of 1867, within those limitations, Acts passed in the mode described by that statute are, as to the Courts and people of that Province, supreme; but that the infant grand-children of the testator, who were interested under the will, not having been expressly named in the Act, their interests remain unaffected thereby.

Strong, V. C., said: That the Act in question is within such defined powers, for it is of a "local" and "private nature" (sub-sec. 16), and relates to "property and civil rights" (sub-sec. 13). But that the will

having directed the whole estate to be converted into personalty, the testator's grand-children domiciled without the Province of Ontario could not be affected by any Act of the Legislature of that Province, the locality of all rights to personal or moveable property being at the domicile of the person entitled to it. And that, therefore, the contingent interest of the grand-children was not "property" or a "civil right" in the Province within section 92 (sub-sec. 13) of the British North America Act of 1867 which conferred the power on the Local Legislatures to legislate as regards "property and civil rights in the Province."

In the distribution of the legislative powers, it must have been intended to confer the right of legislation in private matters, and in matters of property and civil rights theretofore exercised by the Legislature of Canada, either on the Parliament of the Dominion or on the Provincial Legislatures, and there is nothing in the Act shewing an intention to give any part of it to the Parliament. But the laws to be made by the Provincial Legislatures are confined to property, civil rights, and matters of a local and private nature *in the Province*, so that, although no limitation is imposed as regards the extent to which the Legislature may in their discretion affect private rights within their jurisdiction, they are limited to dealing with rights and property *within the Province*.

That the Legislature have that power in all cases where the property and rights sought to be affected are "in the Province" to the same unlimited extent that the Imperial Parliament has in the United Kingdom, I have not the slightest doubt.

The Queen v. Dow et al. (1 Pugsley 300), Held by the Supreme Court of New Brunswick :

That the Provincial Act 33 Vict. c. 47, authorizing the issue of debentures to the Houlton Branch Railway Company to aid in the construction of a railway from Houlton in the State of Maine to the New Brunswick and Canada Railway in this Province, was beyond the powers of the Local Legislature under the "B. N. A. Act, 1867."

This case came before the Court on an application to quash an assessment made on the town of St. Stephen for the purpose of paying the interest on the debentures. Allen, J., in delivering the judgment of the Court, said :

In the case of *Regina v. Chandler* (1 Hannay 548) this Court very clearly enunciated the principles by which it should be governed in determining questions where local legislation was attempted on

matters expressly withdrawn from the Provincial Legislatures, and vested exclusively in the Parliament of Canada, and in the case of *The European and North American Railway Company v. Thomas*, (1 Pugsley 42) we examined those portions of the 91st and 92nd section of the B. N. A. Act, 1867 by which the question now under discussion must be determined.

In that case we decided, that where the railway, the immediate subject of legislation, was to be constructed clearly within the limits of the Province, and not connecting the Province with any other or others of the Provinces, and no power was attempted to be given to extend beyond, it was properly the subject of legislation by the Provincial Assembly.

Fisher, J. (dissenting), held, that the Legislature was clearly authorized to enable the people of St. Stephen to contribute towards the construction of that portion of the line within the Province. If there was any thing in the Act 30 Vic. c. 54 which would come within the exclusive powers of the Parliament it is saved by the 129th section of the B. N. A. Act, 1867, and never having been repealed, altered or amended in any way is still in force. It also appears to me that the Act 33 Vic. c. 47 comes within the category of powers provided for in the 16th clause of the 92nd section of the B. N. A. Act, 1867, being purely a matter of a local nature. It cannot be contended that the B. N. A. Act is to be so construed as to prevent localities from granting aid to some local object, or receive some advantage purely local. Nothing can be more local than the Act 33 Vic. c. 47, for its enactment is made contingent upon a favorable vote of the rate-payers of the locality desiring the railway.

On appeal to the Privy Council from the S. C. of New Brunswick (6 L. R. P. C., 272), their Lordships held :

That the Act of the Provincial Legislature of New Brunswick (33 Vic. c. 47), which enabled the majority of the inhabitants of the Parish of St. Stephen to raise by local taxation a subsidy designed to promote a work which they considered for the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do, does not conflict with sub-section 3 of section 91 of the B. N. A. Act of 1867.

Sir James W. Colville in delivering the judgment of their Lordships said: It was contended that sub. sec. 2 of sec. 92 authorizes direct taxation only for the purpose of raising a revenue for general

Provincial purposes, that is, taxation incident on the whole Province for the general purposes of the whole Province.

Their Lordships see no ground for giving so limited a construction to this clause of the Statute. They think it must be taken to enable the Provincial Legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the Province.

They conceive that the 3rd article of sect. 91 is to be reconciled with the 2nd article of sect. 92, by treating the former as empowering the Supreme Legislature to raise revenue by any mode of taxation, whether direct or indirect, and the latter as confining the Provincial Legislature to direct taxation within the Province for Provincial purposes.

Their Lordships are further of opinion, with Mr. Justice Fisher, the dissentient judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 16th article of section 92 of the Imperial Statute; and therefore one which the Provincial Legislature was competent to pass unless its subject matter could be distinctly shown to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of *L'Union St. Jacques de Montréal v. Dame Julie Belisle*.

McClanagan, appellant, & the St. Ann's Mutual Building Society of Montreal (3 L. N. 61). On the 15th May, 1879, the Dominion Parliament passed an Act to provide for and to authorize the liquidation of the affairs of Building Societies in the Province of Quebec.

Held, by the Court of Queen's Bench, Montreal, that this Act was clearly unconstitutional.

Sir A. A. Dorion, C. J., in delivering the judgment of the Court, said :

This Act is not in the nature of an insolvent law, for it is intended to apply to all building societies whether solvent or not. It is therefore essentially an Act affecting civil rights, which, under the provision of the B. N. A. Act, 1867, comes within the exclusive jurisdiction of the local or Provincial Legislatures.

The case of *L'Union St. Jacques and Belisle* (20 L. C. J. 29) is in point.

In that case the Lords of the Privy Council decided that a law authorizing a Benevolent Association, in financial difficulty, to compel

parties to accept a fixed indemnity in lieu of the annuities to which they were entitled under the rules of the Society, was within the legislative powers of the Legislature of the Province of Quebec, as affecting civil rights only. We cannot, therefore, consider the proceedings in liquidation adopted by the Society as legal. But, these proceedings having since been rendered valid by the Quebec Legislature, there is now no ground to restrain the Society from proceeding to the liquidation of their affairs, and there was none when the judgment of the Court below was rendered and when this appeal was instituted.

Federal U. S. Decisions.

In Beer Company v. State of Massachusetts (97 U. S., S. C., 25), Held :

That all rights are held subject to the police power of a State : and, if the public safety or the public morals require the discontinuance of any manufacture or traffic, the Legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience.

That as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors within the State is not repugnant to any clause of the Constitution of the United States.

Mr. Justice Bradley, in delivering the opinion of the Court, said : Of course, we do not mean to lay down any rule at variance with what this Court has decided with regard to the paramount authority of the Constitution and laws of the United States relating to the regulation of Commerce with foreign nations and among the several States.

The plaintiff in error was incorporated for the purpose of manufacturing malt liquors in all their varieties, it is true, and the right to manufacture undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured.

But if the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not say that property actually in existenco, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa* (18 Wall. 129), was not in existence when the liquor law of Massachusetts was passed.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals.

The Legislature cannot by any contract divest itself of the power to provide for those objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. (Citing—*Boyd v. Alabama*, 94 U. S., 645.)

In *Munn v. Illinois* (94 U. S., S. C., 125), held :

That under the police powers inherent in every Sovereignty the Government may regulate the conduct of its citizens, one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good ; and where warehouses are situated, and their business is carried on exclusively within a State, she may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in inter-State, as well as in State, commerce ; and may limit the rates to be charged for the storage and handling of grain, and require a license to be taken out and a bond to be given, and until Congress acts in reference to their inter-State relations, such regulations can be enforced even though they may indirectly operate upon commerce beyond her immediate jurisdiction.

Mr. Chief Justice Waite, in delivering the opinion of the Court, said : The exercise of these powers does not conflict with that part of the 14th Amendment to the Constitution which ordains that “ no State shall deprive any person of life, liberty, or property without due process of law.”

While this provision of the amendment is new in the Constitution of the United States as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in *Magna Charta*. . . . When one becomes a member of society he necessarily parts with some rights or privileges which, as an individual not affected by his relation to others, he might retain. . . . This is in the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers

under which it has become customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.

Looking then to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris* (1 Harg. Law Tracts 78), and has been accepted without objection as an essential element in the law of property ever since. Property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When therefore one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. .

This statement of Lord Hale was cited with approbation, and acted upon by Lord Kenyon in *Bolt v. Stennett* (8 T. R. 606). And the same has been held as to warehouses and warehousemen in *Aldnutt v. Inglis* (12 East, 527).

In later times the same principle came under consideration in the Supreme Court in Alabama. That Court was called upon in 1841 to decide whether the power granted to the City of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate, but the Court said: "There is no motive for this interference on the part of the Legislature with the lawful actions of individuals or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle in this State tavern-keepers are licensed, . . and the County Court is required, at least once a year, to settle the rates of innkeepers."

In *City of New York v. Miln* (11 Peters 102), Held:

That a State may lawfully require from the master of every vessel arriving in her ports information of the character of the passengers, and that a law passed by the State of New York to this effect was a mere police regulation, and not in conflict with the provision of the

Constitution of the United States conferring the exclusive power on Congress to regulate commerce.

Held, also, that all those powers which relate to merely municipal regulation or which may more properly be called internal police, are not surrendered or restrained; and consequently in relation to these the authority of a State is complete, unqualified and exclusive.

In *Railroad Company v. Richmond* (96 U. S., S. C., 529), Held:

That an Ordinance of the Council of the City of Richmond, prohibiting the use by a Railroad corporation of its locomotives in certain streets of the city, does not infringe upon its constitutional rights, by depriving the Company of its property without due process of law.

That all property in a city is subject to the legitimate control of government unless protected by contract rights. Appropriate regulation of the use of property is not "taking" property, within the meaning of the Constitutional prohibition. Mr. Chief Justice Waite, in delivering the opinion of the Court, said: "The power to govern implies the power to ordain and establish suitable police regulations; and that, it has often been decided, authorizes municipal corporations to prohibit the use of locomotives in the public streets, when such action does not interfere with vested rights.

Such prohibitions clearly rest upon the maxim *sic utere tuo ut alienum non lædas*, which lies at the foundation of the police power.

In *New Orleans v. United States* (10 Peters U. S., S. C., 662), Held:

That the Federal Government has no power to exercise police control over the quays and public places within the State of Louisiana formerly belonging to the Crown of France or Spain,—that the Treaty of cession of Louisiana to the United States could not enlarge the powers of the Federal Government, the State of Louisiana having been admitted into the Union on the same terms as the original States.

In *re Stavin and Corporation of Orillia* (36 U. C., Q. B., 159),

Held by a unanimous Court (Richards, C. J., Morrison and Wilson, J. J. A.): That it was within the authority of the Legislature of the Province of Ontario to grant to a Municipal Corporation a power of limiting the number of taverns in a municipality, or prohibiting the sale by *retail* of spirituous liquors by shopkeepers in such municipality,—that this is a power which may be properly exercised by the Local Legislature as a matter chiefly of police, of a merely local and private nature, when it does not interfere with the sale of imported or manufactured liquors otherwise than *by retail*.

In *Pierre v. Burtrum* (1 Cowper 270) it was held :

That a by-law of a city prohibiting the slaughtering of cattle by butchers within the city limits was not in restraint of trade, but only a reasonable regulation of it by the Local Government.

Story (Com. on Cons. sec. 1066-1014,) says :

The acknowledged powers of the States, over certain subjects having a connection with commerce, are entirely distinct in their nature from that to regulate commerce. Among these are inspection laws, health laws, and laws regulating turnpike roads, and ferries, all of which, when exercised by a State, are legitimate—arising from the general powers belonging to it—unless so far as they conflict with the powers delegated to Congress.

They are not so much regulations of commerce as of police, and may truly be said to belong, if at all to commerce, to that which is purely internal, though they may be controlled by Congress when they interfere with their acknowledged powers.

In *Cowan v. Wright* (23 Grant Ch. 616) Blake, V. C., said :

That exclusive power is conferred upon the Local Legislatures by the B. N. A. Act, 1867, to deal with property and civil rights in the Provinces. The true principle is, adopting the language of the Court in *re Goodhue*, that under the Confederation there has been a Federal, not a Legislative Union ; that to the Provincial Legislatures are committed the powers to legislate upon a range of subjects which is indeed limited, but that within the limits prescribed the right of legislation is absolute. And that the Local Legislatures have that power in all cases, where the property and rights sought to be affected are in the Province, to the same unlimited extent that the Imperial Parliament has in the United Kingdom.

Dobie & Board of Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland (3 L. N. 244) Held, Dec., 1879, by the Superior Court, Montreal, and confirmed by the Q. B., appeal side, 19th June, 1880 :

That under sec. 92, §13, of B. N. A. Act, the Provincial Legislatures are competent, to the exclusion of the Federal Parliament, to deal with property and civil rights in the Provinces ; that in the exercise of that power they may validly legislate over the property of the Presbyterian Church, and to do so they may respectively alter the settlement of that property, made by Acts of the heretofore United Provinces

of Upper Canada and Lower Canada, and that, therefore, the Quebec Provincial Act 38 Vic. c. 64 is not *ultra vires*.

In the Superior Court, Jetté, J., decided as follows :

Having heard the parties by their counsel respectively upon the merits of this cause, examined the procedure, papers fyled, and the evidence, seen the admissions fyled by the parties, and deliberated :

Considering that the petitioner alleges in his demand that the Corporation, defendants, was created, under the name of "The Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland," for the possession and administration of a certain fund belonging to the said Church, and previously created by resolution of the Synod of the said Church, in January, 1855, and that by the statute creating and incorporating the said Board, it was, among other things, provided and warranted that the property of the said fund should belong exclusively to the said Church; that the income of the said fund should be subject to divers annual charges laid upon it at the time of its creation in favor of the ministers of the said Church, and finally, that the members of the said Board should always be ministers or members of the said church, in full communion therewith and that four of them should go out and be replaced every year ;

Considering that the said petitioner alleges besides, that when the said fund was created he was one of the ministers entitled to a charge or annual allowance of \$450, to be taken out of the revenue of the said fund ; that it was then covenanted and admitted as a fundamental principle of the creation of the said fund, that, in order to be entitled to any revenue derived from it, it should be requisite to be a minister of the said Church ; and that the petitioner is still at this day in full possession of his rights and privileges in this respect, having remained a minister of the said Church, and in full communion therewith ; considering that the petitioner alleges moreover, that by an Act of the Legislature of the Province of Quebec passed in 1875, being 38 Vic. c. 64, the condition of administration of the said fund has been changed in a manner to continue in office the members of the said Board for the time being, and to provide for replacing them only in the case of vacancy by death, resignation or absence, and by persons other than members of the said Presbyterian Church of Canada in connection with the Church of Scotland, and that the said Act authorizes, moreover, the said Board to take from the principal of the said fund,—but that, the said

Provincial Statute is unconstitutional and in excess of the powers of the said Legislature of Quebec ;

Considering that the petitioner alleges also, that the present members of the said Board have illegally remained in office, as such, by virtue of the unconstitutional Act above mentioned, that they have no right to fill the said office, and that they have, moreover, acted illegally by paying divers sums to ministers who were no longer members of the said Church, and the petitioner demands in consequence, that the said Provincial Statute, 38 Vic. c. 64, be declared unconstitutional, null and of no effect, that the defendants be declared not legally elected members of the said Board, and that they be ordered to cease from occupying the said office and administering the said property, and finally, that it be declared that the Temporalities Fund in question is the exclusive property of the said Church, and cannot be employed otherwise than for the objects provided for in the first place, and, moreover, that the Reverends John Cook, James C. Muir, George Bell, John Fairlie, David W. Morrison and Charles A. Tanner be declared not to be any more ministers of the said Church, and to have no right to the revenue of the said fund ;

Considering that the defendants—with the exception of the Rev. Gavin Lang and Sir Hugh Allan—have contested this demand, contending among other things that the Statute attacked by the petitioner is constitutional and that their acts are legal ;

Considering that by sec. 92 of the B. N. A. Act, 1867, it is declared that property and civil rights are of the exclusive jurisdiction of the Provincial Legislatures, and that the rights involved in the said Act, 38 Vic. c. 64, of which the petitioner demands the nullity, formally fall within the radius of the said section 92 of the Constitutional Act, and are therefore under the jurisdiction and power of the Provincial Legislature, and that in consequence the said Provincial Statute is valid and legal, and has full force and effect ;

Considering that though the petitioner is not residing in the Province of Quebec, the laws of the Legislature of the Province necessarily affect the rights which he may possess or claim in the said Province, and that therefore the rights which he invokes in this cause are inevitably subject to the provisions of the said Provincial Act, 38 Vict. c. 64 ;

Considering that, according to the provisions of the said Act, the defendants are legally in office as members of the Corporation, and that they have the right to continue to administer the property which has been entrusted to them as such ;

Considering that as well under the terms of the said Act, 38 Vic. c. 64, as by virtue of another Act of the said Legislature of Quebec, viz. : the Statute 38 Vic. c. 62, of which the legality and constitutionality has not been put in question, the said fund above mentioned has remained, subject to all the charges placed upon it, in favor of all the incumbents having right to it, at the moment of its creation—and that, in consequence the right of the petitioner to his annual revenue of \$450 has been completely protected and guaranteed ;

Considering nevertheless, that, by the two Statutes last mentioned, the ownership of the said fund is no more exclusively attributed to the said Presbyterian Church of Canada in connection with the Church of Scotland, but that after the extinction of all anterior rights guaranteed by the said fund, it is transferred to the Presbyterian Church in Canada, formed of the said Presbyterian Church of Canada in connection with the Church of Scotland and of three other churches, the union of which has been authorized by the said Statute 38 Vic. c. 62; and that, by virtue of the dispositions of said Statutes, the said Revds. John Cook, James C. Muir, George Bell, John Fairlie, David W. Morrison and Charles A. Tanner had the right to receive, and the defendants had the right to pay to them, the sums received by them out of the income administered by the defendants ;

Considering in consequence that the demand of the petitioner is unfounded and cannot be maintained, and that the defendants (the Rev. Gavin Lang and Sir Hugh Allan excepted) are well founded in their pleas :

Maintain the pleas of the said defendants (with the above exception), and dismiss in consequence the demand of the said petitioner, and quash and annul to all intents and purposes the writ of injunction issued in this cause and give *main-levée* thereof to said defendants, with costs.

In Appeal to Q. B. :—

Ramsay, J., (*dissenting*)—The whole point of this case has been most ably put by the learned Judge in the Court below, and the issue is really brought down to this : whether certain Acts of the Quebec Legislature are within the legislative powers of that body.

Briefly stated, the facts are these : Prior to 1875, there existed a religious body, known as the Presbyterian Church of Canada in connection with the Church of Scotland. It did not owe its existence to any charter or statute, but it grew out of the settlement in this country, of Presbyterians in communion with the Church of Scotland. But if no statute defined precisely the limits, rights and privileges of this body,

numerous statutes acknowledged its existence ; and the right of its clergy to share in the lands known as the "Clergy Reserves" was admitted. When, by process of legislation, the share of the clergy of the Church of Scotland in Canada became fixed, an Act of the Legislature of United Canada (22 Vic. cap. 66) was obtained to make provision for the management and holding of certain funds of the Presbyterian Church in connection with the Church of Scotland, "now held in trust by certain commissioners, hereinafter named, and for the benefit thereof, and also of such other funds as may from time to time be granted, given, bequeathed, or contributed thereto." The body so incorporated is the Board of Management—the present Respondents.

This Act being still in force, in 1874, numerous clergymen and others, members of different Presbyterian Churches in Canada, deemed it desirable to unite their ecclesiastical fortunes and henceforward to form one body, to be called "The Presbyterian Church in Canada." Nothing could be more lawful or more praiseworthy than the attempt to sink minor differences of opinion in order to attain greater efficiency, but we have not to decide as to motives and intentions ; our duty is deliberately and coldly to decide a question of law.

Application was made almost simultaneously to the Legislatures of Ontario and Quebec for authority to give effect to this determination, and to enable the new body to deal with the property of the Churches so united. An Act of the Ontario Legislature (38 Vic. cap. 75) was passed, the preamble of which sets up that :—

"Whereas, the Canada Presbyterian Church, the Presbyterian Church of Canada in connection with the Church of Scotland, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, have severally agreed to unite together and form one body or denomination of Christians, under the name of "The Presbyterian Church in Canada ;" and the Moderators of the General Assembly of the Canada Presbyterian Church, and of the Synods of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, respectively, by and with the consent of the said General Assembly and Synods, have, by their petitions stating such agreement to unite as aforesaid, prayed that for the furtherance of this their purpose, and to remove any obstructions to such union, which may arise out of the present form and designation of the several Trusts or Acts of Incorporation by which the property of the said Churches, and of the colleges and congregations connected with the said Churches, or any of them respectively, are held and administered or otherwise, certain legislative provisions may be made in reference to the property of the said Churches, colleges and congregations, situate within

the Province of Ontario, and other matters affecting the same, in view of the said Union."

The first section then vests all the property of the different Churches so united, in the united body under the name of "The Presbyterian Church in Canada." Then come reservations and modifications of certain rights, and then, by section 4, certain legislation in Ontario respecting the property of religious institutions, is made applicable to the various congregations in Ontario in communion with the Presbyterian Church in Canada. Section 5, declares that all the property real and personal, belonging to or held in trust for the use of any college or educational or other institution, or for any trust in connection with any of the said churches or religious bodies, either generally or for any special purpose or object, shall, from the time the said contemplated union takes place and thenceforth, belong to and be held in trust for, and to the use in like manner of "The Presbyterian Church in Canada." Section 7 then deals specially with Knox College and Queen's College, situate in Ontario, and with "The Presbyterian College" and with "Morrin College," situate in the Province of Quebec. Section 8 deals with the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland, "administered by a Board incorporated by statute of the heretofore Province of Canada." Section 9 deals with the Widows and Orphans Fund of "The Canada Presbyterian Church" and "The Presbyterian Church of Canada in connection with the Church of Scotland." Section 10 authorizes the new body to take gifts, devises, and bequests; and lastly, section 11 declares that "the union of the said Churches shall be held to take place so soon as the articles of the said union shall have been signed by the Moderators of the said respective Churches."

The legislation in the Province of Quebec took the form of two Acts, 38 Vic. cap. 62 and 64, the former respecting the union of certain Presbyterian Churches; the latter is styled "An Act to amend the Act intituled 'An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland.'"

Cap. 62 of the 38 Vic., Quebec, with the exception of the section relating to the Temporalities Fund, is substantially the same as the Ontario Act, 38 Vic. cap. 74. One or two differences, it may, however, be well at once to note. The Ontario Act bestows all the above mentioned privileges on "The Presbyterian Church in Canada;" while the Quebec Act (c. 62) bestows them on the body so named, "or any other

name the said Church may adopt." This Quebec Act declares, that the union of the four churches is to take place from the publication of a notice in the *Quebec Gazette*, to the effect, that the articles of union have been signed by the Moderators of the said respective Churches. This Quebec Act has also a section which, harmless in itself, is suggestive of the utmost confusion of ideas. It is as follows :

"In so far as it has authority to do so, the Legislature of the Province of Quebec hereby authorizes the Dominion Legislature and the several Legislatures of the other Provinces to pass such laws as will recognize and approve of such union throughout and within their respective jurisdictions."

The other of the Quebec Acts (c. 64) can hardly be called an amendment of the former Act of the old Province of Canada, for it transfers almost the whole of the Temporalities Fund over to the new Church, and confides its management to a Board constituted in a manner entirely different from the Board under the old Act.

The condition of union in Ontario was accomplished, and the notice has appeared in the *Quebec Official Gazette*.

The Appellant, a minister of the Presbyterian Church in Canada in connection with the Church of Scotland, refused to concur in this fusion, and he petitioned for an injunction to prohibit the Board as now constituted to deal with the Temporalities Fund. The Court below has dissolved the injunction : hence this appeal.

The statement in Respondent's factum, "that the petitioner and the seven ministers who continue with him outside the said union have no right to continue the said Presbyterian Church of Canada in connection with the Church of Scotland, and that in fact they are dissentients, voluntarily separated from the said charge," is calculated to mislead. Whatever the legal effect of the proceedings may be, whole congregations have voluntarily separated themselves from the said Church, if the eight ministers have not. But whether the non-conformists be 8 or 8,000 is of no importance, except for the purpose of sensation. The rights of the few are as sacred in the eye of the law as the rights of the many.

As a fact, it is admitted that all the property and money of the Temporalities Fund is situated or invested in the Province of Quebec. The Respondents, relying on sub-section 13 of section 92 B. N. A. Act which gives legislative power to the Provincial Legislatures over "property and civil rights in the Province," contend that having full control over all property, the Legislature of Quebec has full power to deal with all property which may exist in the Province of Quebec, and con-

sequently that it has the power to confiscate the funds of the Presbyterian body situate in the Province of Quebec, and present them to some one else, and that this has been done. On the other hand, Appellant contends that the Local Legislature has no right to incorporate any companies but those having provincial objects (Ib. sub-section 11); that this is tantamount to saying that the right to incorporate companies with other than local objects is exclusively reserved to the Dominion Parliament (sect. 91, B. N. A. Act); that the Board of Management was an incorporation for other than provincial objects, and therefore that it could not have been created a corporate body by a local Act, and consequently that its act of incorporation cannot be altered or amended by any Local Legislature.

I must confess that the sections upon which the contending parties rely appear to me to be irreconcilable by themselves. If the local power to legislate over property and civil rights in the Province is to be interpreted to mean over "all" property, &c., then the power of Parliament to incorporate is illusory. In practice it never has been contended that property means all property. Railway companies incorporated by Parliament, for instance, hold and manage their property under Dominion laws, and such companies evict people from their private property in each Province under Dominion laws. No one will venture to affirm that a local Act could confiscate the property of a railway company incorporated by Parliament, or transfer it to another company or person. And so it has been decided in the case of *Bourgoin and The Q. M. O. & O. Railway Co.* by the Privy Council (3rd Legal News, p. 185), that a railway with all its appurtenances, and all the property, liabilities, rights and powers of the existing company, could not be conveyed to the Quebec Government, and, through it, to a company with a new title and a different organization, without legislative authority, and that if the railway was a Federal railway, the Act authorizing the transfer must be an Act of the Parliament of Canada. Nor, by parity of reasoning, could the Local Legislature confiscate the surplus funds of a bank on the pretext that it was property in the Province. It is impossible to conceive more obvious limitations to the right to legislate as to property, than these. Again, we have had two decisions limiting the sub-section in question. In the case of *Evans v. Hudon and Browne*, T. S., Mr. Justice Rainville held that a local Act was unconstitutional which authorized the seizure by process of law of the salaries of federal officers (22 L. C. J., p. 268) and the Court of Appeal in Ontario, in the case of *Leprohon and The Corporation of Ottawa* (2 Tupper, p. 522),

held, reversing the judgment of the Queen's Bench (40 U. C. R. 478), that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. These decisions can only be sustained on the ground that property, in the sub-section in question, does not include such property and civil rights as are necessary to the existence of a Dominion object, to copy the phraseology of the B. N. A. Act. It may, perhaps, be said that sec. 91, ss. 8, B. N. A. Act, specially gives to the Federal Parliament the power of fixing the salaries ; but this does not seem to me to affect the question. After the salary has been fixed and is possessed by the individual, it becomes property in the Province. We are, therefore, obliged to sustain the judgment on some other general principle which limits the effect of ss. 13, sec. 92 B. N. A. Act.

On the other hand, we have a decision of Vice-Chancellor Blake, in the case of *Cowan and Wright* (23 Grant, Ch. Rep., p. 616), upholding the constitutionality of the Ontario Act 38 Vic. cap. 75, except in so far as it attempted to deal with property in the Province of Quebec. This is, of course, a decision of the precise point before us, and therefore it becomes important to examine the grounds upon which it was rendered. It appears to me that it is undeniable that the Local Legislature acting within the scope of its powers, has a right to legislate, as absolute as the Dominion Parliament legislating within the scope of its powers. Indeed this doctrine as to the respective powers of the Dominion and Local Legislatures seems to me to be almost the only one on which there has been entire unanimity of opinion. But when, from this it is sought to glide to the conclusion that the words of section 92 are alone to be considered as defining the exclusive rights of the Local Legislatures, I think we arrive at a doctrine, opposed to positive law and to the authority not only of the Courts, but to the authority of practice.

There is a sort of floating notion, that, by the conjoint action of different Legislatures, the incapacity of a Local Legislature to pass an Act may be in some sort extenuated. Section 15 of the 38 Vic., cap. 62 (Quebec), seems to have been added under the influence of such an idea. By it, the Dominion and Local Legislatures are permitted to recognize and approve. I cannot understand anything more clear than this—that the Local Legislatures by corresponding legislation cannot in any degree enlarge the scope of their powers. When the question, is, between the authority of Parliament and that of a Local Legislature, the forbearing to

legislate in a particular direction by Parliament, may leave the field of local legislation more unlimited. This is the only bearing I can conceive the case of the *Union St. Jacques and Belisle* (20 L. C. J. 29; 6 P. C. 31) can have on this case. What the Privy Council held in that case, was, that a special Act for the relief of a corporate body did not fall within the meaning of "Bankruptcy and Insolvency" (B. N. A. Act, sect. 91, ss. 21), and this more particularly as there was no Dominion Act with which it interfered. It is, therefore, dead against the pretension of Respondents in this case, for the legislation objected to, upsets a Dominion Act—that is to say, if corporations which have not alone provincial objects (provincial according to the meaning of the B. N. A. Act, *i. e.*, relating to one Province under the Act) created before Confederation, are under Dominion Laws. On this point there has never been a doubt. For instance, the Acts of incorporation of the G. T. Railway, an old Province of Canada incorporation, have been amended by Dominion Acts, never, by local ones.

Another authority in support of the constitutionality of the Ontario Act has been mentioned by Mr. Todd in his very valuable volume on "Parliamentary Government in the British Colonies" (p. 355). This is, of course, an authority not to be despised, and if it had been given free from all bias by political considerations I should have considered it a very valuable opinion. But, without meaning to imply any sort of criticism as to the exercise of the discretion of the Federal Government in the disallowances of bills, I may say, that we all know that the Federal Government is most unwilling to interfere in a too trenchant manner with local legislation, and where, there is room for doubt as to the limits of the powers exercised, and where, great popular interests are involved, they readily leave the question to the decision of the Courts. The report referred to by Mr. Todd, therefore, amounts to little more than this, that where part of an Act is evidently *ultra vires* and the rest not evidently so, the Federal Government will not interfere and disallow the bill.

I therefore say that a law which is *ultra vires*, in part, may thereby be *ultra vires*, in whole, and so it should be construed, at all events when it appears that the object of the Act is not attained by a partial execution. Take for instance an Act of Incorporation of a railway company from Quebec to Toronto. Could that be interpreted as an Act of Incorporation from Quebec to the Province Line? Unquestionably it could not be. But I shall be told there is a special exception for that in sect. 92, ss. 10, *a*. The exception is not, however, more

formal than the exception from incorporation by local Act, of companies having other than provincial objects. I therefore think that the Act purporting to create the body to be benefited by the transfer of the temporalities fund, is *ultra vires*, in whole.

I would therefore reverse, and Mr. Justice Tessier, I understand, concurs in the conclusion at which I have arrived.

McCord, J. It is unnecessary for me to state the facts of this case ; they are fully set forth in the printed remarks of the learned Judge who rendered the judgment appealed from. As to the law of the case resulting from those facts, I am of opinion that the Quebec Act, 38 Vic. chap. 64, in so far as it alters the constitution, composition, and succession of the Board for the management of the Temporalities Fund is *ultra vires*.

The Board in question is a Corporation created by the statute of the late Province of Canada (now the Provinces of Quebec and Ontario), 22 Vic. chap. 66. It was created for the management of a fund derived from, and existing in, both Ontario and Quebec, and belonging to a Church the territorial limits of which embraced both Provinces, and the government or synodical management of which, was not carried on in one Province only, but in both. This Corporation was not created for a "provincial (Quebec or Ontario) object," nor has it a provincial character. On the contrary, it was created in the interest and for the advantage of both Provinces. Being created for two Provinces, and applicable to them both, it can only be altered by a Parliament having power to legislate for these two Provinces. The character or scope of this Corporation could not cease or change by reason of the fund happening at any time to be invested wholly in one of the Provinces, and of the place of business of the Corporation being at that time within that Province. The Board could at any time remove its investments and its place of business to the other Province, and its powers of management were in no wise confined to either Province. The Corporation is not a mere accessory of the property which it has to administer, and though the Provincial Legislature may control the "property" within its limits, and even the "rights" of the Corporation in connection with that property, yet it cannot alter the Corporation itself. If the legislative control of the property carried with it the power to alter the Corporation, the consequence would be, that if, as may be the case at any future time, one portion of the fund was invested in Ontario and the other in Quebec, one Provincial Legislature could enact that the Corporation should be composed of one set of

persons and the other Legislature could ordain that it should consist of another set of members, and the absurd conclusion would be, that there could be two Boards of Management.

It seems to me, therefore, that the provisions of the Act, 22 Vic. chap. 66, respecting the composition and formation of the Board, have not been set aside by the Quebec Act, 38 Vic. chap. 64, and are still in force; for it is evident that they could not be set aside by the mere action of the Synod.

Sir A. A. Dorion, C. J. :—

This is an extremely important case in which the Appellant, by means of a writ of injunction, contests the right of the Respondents to the management of a large amount of property. It involves one of the most intricate questions arising out of the distribution under "The British North America Act, 1867" (commonly called The Confederation Act) of the Legislative powers attributed to the Dominion Parliament and to the Local or Provincial Legislatures respectively.

It is not surprising that difficulties of this kind are recurring very frequently under our Constitutional Act—I consider, however, that the Act is as clear as it could be made, to embrace so many questions in a small compass.

The principal question presented in this case resolves itself into this. A certain society was incorporated under an Act of the old united Province of Canada (22 Vict. cap. 66), and this society merged itself into a body embracing several churches of like doctrine—the important inquiry is, whether it was the Legislature of the Dominion, or of Quebec, that had authority to legislate on this question. The society was incorporated by an Act of the united Legislature of Upper and Lower Canada, and the question submitted to the Court, is, as to whether the Legislature of the Province of Quebec has the power to amend, as regards that Province, an Act passed by the Parliament of the late Province of Canada—that is, of the then united Province of Upper and Lower Canada—entitled, "An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland."

It is strictly a question of law to be determined by the provisions of the British North America Act of 1867.

The purpose of the amended Act, as its title indicates, was to incorporate a religious body for the management of the temporalities of their Church, and that of the amending Acts 38 Vict. ch. 62 and 64, was to sanction the union, effected by the body so incorporated, with three

other religious bodies, and to merge into one fund, the property which belonged to them respectively at the time of their union or which they may hereafter acquire; and to manage it in furtherance of the object of their institution.

It is contended on behalf of the Appellant, that the original Act of Incorporation having been passed by the Parliament of the late Province of Canada—now constituting the Provinces of Ontario and Quebec—and its provisions extending to the two Provinces, this original Act is beyond the control of the Legislatures of these Provinces acting separately; that the Legislature of Quebec could not touch an Act of the old Legislature affecting both Provinces, that is to say, that an Act not Provincial in its object passed before Confederation, cannot be touched, except, by an Act of the Dominion Parliament. But, was it not the fact that every day the Local Legislature was repealing whole bodies of laws, affecting both Provinces, which had been passed before the division of the old Province into Quebec and Ontario? To go no further than a case in this Court in February last, *McClanaghan and The St. Ann's Mutual Building Society* (3 Legal News, 61) it was clearly intimated that the Dominion Legislature had no right to legislate for the winding up of a building society incorporated by an Act of the Parliament of Canada, this being a matter affecting property in Lower Canada, and that it must be done by an Act of the Local Legislature.

In the present case, a majority of twenty to one, resolved that it would be beneficial to them to join with three other bodies whose differences are more in name than in substance. This body happened to have funds, the object of which was, to pay ministers. They had funds in Lower Canada, and they wanted authority to manage that fund, so as not to be interfered with by any member of the Corporation. The Local Legislature incorporated them, and gave them the right to manage their property in this Province. But it was said, that is spoliation. That question, was decided by the Privy Council, in the case of *Union St. Jacques and Belisle*. The Union was unable to pay the stipulated annuities to members, and it got authority from the Local Legislature to commute the payments for a fixed sum. The question was raised, whether the Province of Quebec could interfere with vested rights, and the Privy Council maintained the validity of the local Act. Here, the Legislature merely said to Mr. Dobie, if you don't wish to do as the others have done, your rights shall not be interfered with. If you don't join them, you shall not be deprived of any right. The Legislature of

Quebec did not touch any rights which Mr. Dobie might have in the Province of Ontario ; if they had done so it would have been a dead letter, but they expressly limited themselves to the property within this Province.

By section 92 of the British North America Act of 1867, the legislative powers conferred exclusively upon the Local Legislatures are defined, and among them, are to be found at sub-section eleven (11), "The incorporation of companies with Provincial objects ;" at sub-section thirteen (13), "Property and Civil Rights in the Province," and at sub-section sixteen (16), "Generally all matters of a merely local or private nature in the Province."

An Act incorporating a religious body for the purpose of acquiring property, and of managing it for the support of their ministers, and of educating young men for the ministry, is undoubtedly, an Act conferring a civil right, by giving to the body so incorporated a civil *status* which it had not before. When the powers imparted by such incorporation apply to one Province only, the incorporation is for Provincial purposes, and its franchises can only be conferred, by the Legislature of the Province where those franchises are to be exercised, and not by the Dominion Parliament. As regards the other Provinces of the Dominion, such a Corporation has no rights in such other Provinces other than those which, according to the laws in force in each Province, may be exercised by any Foreign Corporation.

A religious body so incorporated in one Province might, however, wish to extend its operations and seek to obtain the same corporate rights in one or more of the other Provinces ; and, it can hardly be contested, each Local Legislature would have the same power to grant to a body already incorporated in one Province, the same franchises to be exercised within the limits of its own jurisdiction—and all the Local Legislatures might successively do the same. These corporate rights would not cease to be civil rights, nor to have Provincial objects, for having been successively granted in more than one of the Provinces of the Dominion ; and the Dominion Parliament could not, therefore, claim to interfere and grant to a society incorporated in Quebec the same corporate rights in Ontario, under the pretence that the society being already incorporated in Quebec, its operations would extend to more than one Province by the new Act of incorporation ; nor could the Dominion Parliament assume on the same ground to repeal or amend an Act incorporating a society in one Province, with a view to extend its repealed or amended provisions to two or more of the Provinces.

There is no power given by the Confederation Act to the Dominion Parliament to amend or repeal an Act, passed by a Local Legislature within the limits of its authority, and there is no concurrent authority conferred in this matter, upon the Dominion Parliament and the Provincial Legislatures. If, therefore, the Local Legislature has the right to incorporate a church society, and confer upon such society, corporate rights and franchises within its own Province, this right is exclusive, and cannot be exercised by the Dominion Parliament, for it is not one of the classes of subjects mentioned in section ninety-two (92) of the Confederation Act, whereby a concurrent power of legislation is allowed in certain special matters to both the Dominion Parliament and the Local Legislatures.

If the right to incorporate a religious society, such as the one concerned in this case, belongs to the Local Legislatures when the incorporation takes place successively in the different Provinces, it is clear, that the several Legislatures may impose different conditions on the incorporated body, or may even refuse an Act of incorporation altogether. Let us suppose that separate charters with different conditions were granted in several of the Provinces and refused in the others, on what ground could the Parliament of Canada interfere to make the same provisions for every Province, or even to impose such a corporation on the Provinces which might have already rejected it.

The British North America Act was passed for the very purpose of allowing each Province to regulate its own internal affairs—including civil rights and incorporations for Provincial objects—without interference on the part of the representatives of the other Provinces, through the Dominion Parliament. It would be a mere evasion of the plain tenor and object of the Act, to say, that the Dominion Parliament could interfere in matters purely Provincial, merely because, two or more of the Local Legislatures had adopted the same legislation, or, what would be more obnoxious, because they had refused to do so. It has been held, and I believe without a dissenting voice, that the Dominion Parliament could not grant to the Orange Society an Act of incorporation with franchises applying to the whole Dominion, and that the Local Legislatures could alone create such a Corporation for their several Provinces respectively,—and Bills have accordingly been introduced for that purpose and discussed in the Local Legislature of Ontario during several successive sessions. This, shows, that what are civil rights and Provincial objects is not to be determined by the extent of territory to which interested parties may wish to apply legislative action, but by the character of such rights and objects.

But it is contended that the Imperial Parliament having expressly excluded by sub-section ten, of section ninety-two (92) of the Confederation Act, from the jurisdiction of the Local Legislatures, all "lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," has shown its intention of conferring on the Parliament of the Dominion powers of legislation on all matters affecting more than one Province.

The inference I draw from this enactment is quite different and adverse to the pretensions of the Appellant. This sub-section ten (10) contains an exceptional disposition affecting Works and Undertakings—which could hardly create any irreconcilable sectional feeling and controversy—and which it was thought necessary, on account of their general importance, to submit to the control of the Dominion Parliament. The incorporation of a religious society is not included in this sub-section, and therefore not comprised in its exceptional disposition. If this exception concerning railways, canals, telegraphs and other similar Works had not been made, they would have fallen under the general rule, and all such Works made in each Province would have been a Provincial Work subject to Provincial legislation and control. To show more clearly that the Imperial Parliament intended to place the legislation on these Works and Undertakings on a different footing from other purely local subjects of legislation, this very sub-section ten (10) also excludes from Provincial legislation, all such Works; that is, lines of Steamers, Railways, &c., as, although wholly situate within the Province, should be declared by the Parliament of Canada, either before or after their execution, to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. No such power is given by the Act on any other subject of legislation falling within the authority of the Local Legislature, and this purely exceptional provision cannot be extended to other matter not enumerated in this sub-section ten (10). There is therefore no more reason for saying that the Dominion Parliament can incorporate a religious society because the promoters of the measure wish to extend its operations to two or more Provinces, than there would be for saying that it could declare that a corporation already existing in one of the Provinces is for the advantage of two or more Provinces, and therefore subject to its legislative control.

It is said, the Statutes now under consideration are not to create a new Corporation, but to alter the character and the conditions of an

existing Corporation under a Statute passed by the Parliament of the late Province of Canada, the provisions of which applied equally to the Provinces of Upper and of Lower Canada, and it is further argued, that, the Local Legislature of the Province of Quebec having no right to repeal or alter an Act affecting the late Province of Upper Canada, now constituting the Province of Ontario, the amendments passed by the Legislature of Quebec would have this effect—that, a Corporation originally established for the two Provinces, under the same Act and the same regulations, would now be governed by different rules and even by different Boards in each Province.

Although this difficulty cannot now arise, since we know that the Legislature of the Province of Ontario has also legislated to the same effect as that of the Province of Quebec, yet it must be admitted that such might have been the result of the amending Acts, and we must be prepared to meet this apparent difficulty.

It will hardly be contended that the Local Legislatures of the Provinces of Ontario and Quebec have not the power to amend or repeal altogether the Acts passed by the late Province of Canada relating to civil rights or local matters in each Province. It is true that the Statutes of the late Province of Canada which were in force when the Confederation took place, are continued in Ontario and Quebec by section 129 of the Confederation Act, but, subject “to be repealed, “abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the “Parliament or of that Legislature under this (the Confederation) Act.” We have seen that the authority to pass laws relating to civil rights is in the Local Legislature. This section (129) therefore expressly authorizes the Local Legislatures to repeal, abolish, or alter any Statute of the Province of Canada relating to civil rights in the Province to which these Legislatures respectively appertain.

The altering or repealing of such an Act by one Legislature only, would not affect its operation in the other Province, and taking the case of a Corporation like that of St. Andrew’s Church, such a Corporation might continue to subsist in one Province and cease in the other. This, however, is a necessary consequence of the authority given to each Local Legislature to deal exclusively with certain matters in relation to their internal affairs.

If inconveniences should result from such an interpretation of the British North America Act, 1867, they are not to be compared to the anarchy which would be created by giving to the Local Legislatures the

exclusive authority to legislate generally on all questions of civil rights, and by retaining to the Parliament of Canada the absolute right to legislate on the same subjects, whenever they should have been regulated by Statutes passed by the late Province of Canada, or whenever it was proposed to subject two or more Provinces composing the Dominion to the same laws, or extend a Statute already in force in one Province, to another or to the whole Dominion. This would enable the Dominion Parliament to interfere in almost every subject matter of legislation coming within the scope of the legislative powers conferred on the Local or Provincial Legislatures. The Dominion Parliament would only have to declare that it was expedient to have the same laws in more than one of the Provinces of the Dominion, to give itself exclusive jurisdiction in such matters. There would, in that case, be two codes of laws relating to civil rights.

The Provincial Legislature might for instance pass laws to prevent the accumulation of property in the hands of private Corporations as being contrary to public policy, and at the same time the Parliament of Canada might create new Corporations for civil purposes, or amend the charters of existing Corporations, and confer upon them the right to acquire and hold property in *mortmain* to an unlimited extent. The result being the most inextricable confusion.

After the most careful consideration I have been able to give to this important case, I have come to the conclusion that the Act, 38 Vict. ch. 64, to amend the Act intituled, "An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church in Canada in connection with the Church of Scotland," is an Act affecting the *status*, the property, and the civil rights of the corporation, within the Province of Quebec, and that, under sub-sections 11 and 13 of section 92 of the British North America Act of 1867, these were within the scope of the legislative authority conferred on the Local Legislature of that Province; that the fact that the Board was incorporated by an Act passed by the Parliament of the late Province of Canada, or that the amended Act applied to the two Provinces of Upper and Lower Canada when the British North America Act was passed, did not alter its character, nor subject the corporation to the control of the Parliament of Canada.

I am therefore of opinion, with Mr. Justice Monk, of confirming the judgment rendered by the Court below, and as Mr. Justice McCord is also of opinion of confirming the judgment, although on other grounds, the judgment will be confirmed.

I may here add that the Honorable Mr. Blake, when Minister of Justice, held, in a report to the Privy Council that the two statutes passed by the Legislature of the Province of Ontario to make similar provisions to those contained in the Act now under consideration, were not *ultra vires*, except as to certain provisions having reference to a College situate in the Province of Quebec.

The constitutionality of the two Acts passed by the Ontario Legislature has also been sustained by the Court of Chancery in Ontario in the case of Cowan & Wright (23 Grant 616).

MONK, J., concurred with the Chief Justice. His Honor adverted to the high standing and position of the united bodies, and to the fact that no injustice had been done to individuals.

He was inclined to believe that the Act was constitutional, and, upon the whole case, had no hesitation in concurring in the judgment of the Court below.

Judgment confirmed, Ramsay and Tessier, JJ., dissenting.

Contracts with Insurance Companies.

Chamberlain, on Insurance Corporations in United States, says (p. 236) :

No national legislation has yet been had regulating the right of insurance companies existing under the laws of one of the States to do business in the other States, and no case in which this precise question was raised has been carried to the Supreme Court of the United States.

In the matter of Insurance Corporations, we find the State of Arkansas a few years since passing a law which burdens State companies and exempts those of England and Germany.

If insurance comes fairly within the designation of the general word "commerce," then it is clear that Congress would have the right to regulate the terms upon which insurance corporations may transact business in a State other than that in which they are located. As the commerce of the world is carried on at this day, it cannot exist without insurance, and to render insurance safe, and payment of losses prompt and certain to the insured, it must be widely scattered, and to secure a sufficiently broad average to render the business safe to the insuring corporation, risks must be scattered over a large extent of country. If this be true, and if the States shall unwisely refuse to exercise a liberal comity to these corporations, it may become important to their existence and prosperity that Congress shall pass a general regulating law.

By Art. 2470 of the Civil Code of the Province of Quebec, Marine Insurance is always a commercial contract; other insurances are not by their nature commercial, but they are so when made for a premium

by persons carrying on the business of insurers, subject to the exception contained in the next following article.

By Art. 2471, Mutual Insurance is not commercial. It is governed by special Statutes.

In *Ballagh v. Royal Mutual Fire Ins. Co.* (44 U. C., Q. B., 88), Armour J., said:

Before the passing of the Act, R. S. Ont., ch. 162, insurance companies could endorse just such conditions as they pleased upon their policies, whether such conditions were reasonable or unreasonable, and some insurance companies carried their power in this respect to such an extent that they endorsed conditions upon their policies of such a character that no person insured could comply with them; and whether they would pay a just claim or not was a matter entirely at their option, for it could not be recovered if they resisted it. Thereupon every person began to call upon the Legislature to interfere to put a stop to such injustice, and no one called so loudly as the judges. The Legislature, yielding to this very proper appeal made to them, passed this Act, entitling it "An Act to secure uniform conditions in policies of fire insurance," and provided that certain conditions therein set forth, and called statutory conditions, should be printed on every policy, and gave the insurers power to vary, omit, or add to such conditions, but only in the mode prescribed by the Act.

In *Dear v. Western Assurance Co.* (41 U. C., Q. B., 562):

By a Statute of the Province of Ontario (38 Vic. ch. 65) it is provided that, where in certain cases "the conditions of any contract of fire insurance on property in this Province, as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with," no objection to the sufficiency of such proof shall in any of such cases be allowed as a discharge of the liability of the company on such contract. Held:

That this enactment was not beyond the power of the Provincial Legislature, and applied to the Company, defendant, although incorporated under a Dominion Statute.

That such legislation was not an encroachment on the powers of the Dominion Parliament, as it was a matter relating to "property and civil rights in the Province," and also a matter of a local and private nature.

Ulrich v. The National Insurance Co. (42 U. C., Q. B., 159),

Was an action on a fire insurance policy in which the Company, defendant, pleaded the breach of certain conditions of the policy.

The plaintiff, for replication alleged that the said conditions were

not in conformity with any of the Statutory conditions provided for in the Ontario Statute 39 Vict. c. 24. The defendants demurred to this replication.

Held, that the defendants, notwithstanding their incorporation by the Legislature of the Dominion, are, when doing business in the Province of Ontario, subject as regards such business to the Provincial Statute, 39 Vict. ch. 24, passed for the purpose of settling by legislative declaration the conditions which "shall as against the insurers be deemed to be part of every policy of fire insurance hereafter entered into or renewed, or otherwise in force in Ontario with respect to any property therein."

Parsons v. The Citizens Insurance Co., 43 U. C., Q. B., 261, Harrison, C. J., and Armour, J., (affirmed 4 Ont App. 96).

Held, following *Ulrich v. National Ins. Co.* (42 U. C., Q. B., 261) and *Frey v. Wellington County Mutual Insurance Co.* (43 U. C., Q. B., 192): That a policy of insurance issued by the defendant (incorporated under a Dominion Act) to the plaintiff, not containing the conditions required by the Ontario Act, 39 Vict. c. 24, is to be deemed as against the insurer as a policy issued without conditions, consequences which the Statute itself imposes for a non-compliance with its provisions.

Harrison, Ch. J., in delivering the judgment of the Court of Q. B., said :

Now, the important question is, whether the Legislature of Ontario had power to pass an Act so general and so comprehensive in its terms as the 39 Vic. ch. 24.

For the powers of the Dominion and Provincial Legislatures, we must refer to the fundamental law on the subject, the British North America Act.

The only *exclusive* powers expressly conferred by that Act on the Provincial Legislatures are those enumerated in sec. 92 of the Act.

One of these is "the incorporation of companies with provincial objects." Sub-sec. 11.

Another is "property and civil rights in the Province." Sub-sec. 13.

The last is "all matters of a merely local or private nature in the Province." Sub-sec. 16.

Subject to these and other powers enumerated in sec. 92, it is in the power of the Legislature of the Dominion "to make laws for the peace, order and good government of Canada."

No words used in reference to legislation could be more comprehensive than these words. Examples however, are given of the exclusive

legislative powers as to different classes of subjects intended to be vested in the Dominion Parliament. These it is expressly declared are not "to restrict the generality of the foregoing terms" of the section. And no matter coming within any of the classes of subjects enumerated in section 91 is to be "deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It is not possible for each of two legislative bodies as between themselves *exclusively* to exercise the *same* powers. If the power be shewn to belong to one of the bodies, this, under such a section, excludes the other from the exercise of the power. In *Robertson v. Steadman* (3 Pugs. 621), the Supreme Court of N. B. apparently read section 92 as follows: "In each Province (*except as to the classes of subjects enumerated in the preceding section assigned exclusively to the Legislature of the Dominion*) the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereafter enumerated, that is to say, etc."

But with all due respect it appears that this reading is not a satisfactory one, because the classes of subjects enumerated in section 91 are only as mere *examples* of Dominion legislative powers, and it is expressly declared that the design is not thereby "to restrict the generality" of the preceding extensive powers "to make laws for the peace, order and good government of Canada."

The great distinction between sec. 91 and sec. 92, is, that while in the former the subjects enumerated are only designed as *examples* of exclusive legislative powers, in the latter the exclusive legislative powers appear to be all enumerated. See per Lord Selborne, in *L'Union St. Jacques de Montréal v. Bélisle* (L. R. 6 P. C. 31-35), and per Sir James W. Colville, in *Dow v. Black* (L. R. 6 P. C. 272-280).

The exclusive power, for the incorporation of companies with other than provincial objects, is not in express language conferred on either legislative body but impliedly remains with the Dominion Legislature.

It is not essential to the exercise of such a power by either Legislature, that at the time of the creation of the Corporation there should be details as to the form of the contracts which the created body may make.

The power of an artificial body to contract, must, on well understood principles of law as regards the form of the contract, like the power of a natural person to contract, be subject to the laws of the country, province, or place where the contract is made.

A Corporation can exist only within the limits of the sovereignty which created it, but it may act elsewhere through agents, if the laws of other countries permit. (*Bank of Augusta v. Earle*, 13 Peters 519.)

The National Insurance Company, as a Corporation owes its being to the Legislature of the Dominion. That Legislature, when giving it being, not only gave it perpetual succession, but power to contract for insurance against loss or damage by fire; but, the form of the contract, and the rights of the parties thereunder, must, we think, depend upon the laws of the country or province in which the business is done.

In this respect the defendants are in no better or worse condition than a foreign Corporation doing business in the Province of Ontario. (*Howe Machine Co. v. Walker*, 35 U. C., Q. B., 37). . . .

Parsons v. The Queen Insurance Co. (43 U. C., Q. B., 271), affirmed 4 Ont. App. 109.

This case arose upon a contract of insurance similar to the preceding one of *Parsons v. The Citizens Insurance Co.*, the Ontario Court of Appeal affirming the judgment of the Queen's Bench, and holding that the defendants could not resort to their own conditions nor to the statutory conditions, as they were not printed on the policy as required by the Ontario Statute; that the Ontario Statute was not *ultra vires*, as the Legislature of Ontario had power to deal with an Insurance Company incorporated by the Dominion Parliament in reference to insurances effected in Ontario; and holding that policies of insurance are not transactions coming within the words "Trade and Commerce," and so within the exclusive jurisdiction of the Dominion Parliament.

That policies of insurance, being mere contracts of indemnity against loss by fire, are like any other personal contracts between parties governed by the Local or Provincial law.

That the Provincial Legislature has the power to regulate the legal incidents of contracts to be enforced within its Courts, and to prescribe the terms upon which corporations, either foreign or domestic, shall be permitted to transact insurance business within the limits of the Province (adopting the reasoning in *Paul v. Virginia*, 8 Wall, 168).

The judgments in these cases of *The Queen Insurance Co.* and *Parsons* and *The Citizens Insurance Co.* and *Parsons*, on Appeal, were confirmed by the Supreme Court (Can.) 21st June, 1880.

Fournier, J., concurring in the dismissal of the appeals, stated the facts as follows :

The principal question to be decided in these cases is whether the Ontario Act, 39 Vic. ch. 24 (now ch. 162 of the Revised Statutes of

Ontario,) "an Act to secure uniform conditions in policies of fire insurance," is *intra vires* of the Ontario Legislature. Its constitutionality is questioned on the ground that the power of legislating in reference to the subject matter of insurance belongs to the Federal Parliament, as the necessary sequence of its exclusive power to regulate trade and commerce.' (Sect. 92, § 2).

In order to ascertain whether there is a conflict of powers, the first step, no doubt, is to examine the character of the law in question. As may be seen from its title, the object of the Act is to secure uniform conditions in policies of fire insurance. The second section enacts, that if the conditions of the contract of insurance have not been strictly complied with, it shall not be a sufficient reason to annul the contract. First, where, by reason of necessity, accident or mistake, the conditions have not been complied with; secondly, where, after proof of loss has been given in accordance with the conditions of the contract, the Company objects to the loss upon other grounds than for imperfect compliance with such conditions; thirdly, where, after having received this proof, the Company does not notify in writing to the assured, within a reasonable time, the reason for which the Company considers the proof defective; fourthly, when the Court or Judge for any other reason considers it inequitable that the insurance should be deemed void by reason of imperfect compliance with such conditions. The third section declares *that the conditions set forth in the schedule to the Act shall, as against the insurers, be deemed to be part of every policy of fire insurance, with respect to any property situate in the Province of Ontario*. These conditions must also be printed on the policy of insurance, with the heading "Statutory Conditions." The fourth section indicates the manner in which the conditions may be varied or omitted, or new conditions added by being printed in a particular way. The fifth section declares that the variations shall not be binding on the assured unless they have been made in conformity with the fourth section. If the contrary is done, the policy shall, as against the assurers, *be subject to the statutory conditions only*. By the sixth section, it is declared that if any other conditions than the statutory conditions are inserted in the policy, and that the Judge of the Court declares that they are not just and reasonable, that such conditions shall be null and void. The seventh section allows an appeal from any decision given under the Act.

Taschereau, J., *dissentiente*, said:

I do not concur in the judgment of the Court in these cases, and I proceed to state the grounds upon which I dissent;—

The Citizens' Insurance Company of Canada, known in the first instance under an Act of the late Province of Canada (19 and 20 Vic. cap. 124, 1856), as the Canada Marine Insurance Company, later, under 27 and 28 Vic. cap. 98, 1864, as the Citizens' Insurance and Investment Company, and now, under its present name, by an Act of the Dominion Parliament, 39 Vic. cap. 55 (1876), has obtained from the Federal authority, by this last statute, the right to make and effect contracts of insurance upon such conditions, and under such modifications and restrictions, as might be bargained or agreed upon by and between the Company and the persons contracting with them for such insurances.

By chapter 162 of its Revised Statutes, the Ontario Legislature has virtually revoked this power which this Company held from the Federal authority, and repealed the enactment of the Dominion Act under which the said Company held this power,—for a law repugnant to another as entirely repeals that other, as if express terms of repeal were used.

Had the Ontario Legislature, under the British North America Act, the power to do so? or, to put the question in another shape: Had the Dominion Parliament the right to pass the 39 Vic. cap. 55, under which the Company Appellant claims the right to issue its policies under such conditions as they please? For it must be admitted that, under the British North America Act, there can be no concurrent jurisdiction in the matter between the Federal and the Local Legislative authorities, and that if the Dominion Parliament had the power to so authorize the said Company to issue its policies under such conditions as it pleased, and to enact the said 39 Vic. cap. 55, the Local Legislature had not the power to revoke this authorization or to repeal the said Act. It would be a strange state of things if the Local Legislatures could repeal an Act passed by the Dominion Parliament. They cannot do it either expressly or impliedly. They cannot by their legislation render nugatory the enactments of the Federal Legislative power on subjects left under the control of the same Federal Legislative power by the British North America Act.

Are these statutes—the Federal Act, creating the Company Appellant, and the Ontario Act imposing conditions on its policies of insurance—regulations of trade and commerce? If they are, the Federal Act is constitutional and the Ontario Act unconstitutional. Both these statutes are regulations of commercial corporations and commercial operations, and the words "regulation of trade and commerce" in section 91 of the British North America Act mean—all regulations of

all the branches of trade and commerce. A contrary interpretation would be against the very letter of the Act. Companies doing the business of insurance, are commercial companies, and their operations are of a commercial nature. In one of the Provinces (Quebec) so far back as 1845, long before the Civil Code, the Court of Queen's Bench, in Montreal, composed of Vallière, Rolland and Day, J. J., in a case of *Smith v. Irvine*, reported at page 47 of the first volume of the *Revue de Législation*, held that the insuring against fire by an Insurance Company is a commercial transaction—so it is held to be in France. Boudousquie, *Traité de l'Assurance*, No. 70 and 384; Dalloz, *Actes de Commerce*, No. 216; 2 *Pardessus Droit Commercial*, No. 588; Dalloz *Diction. vo. Assurance Terrestre*, Nos. 19, 20 and 22.

In Prussia, Belgium, Portugal, Spain, Holland and Wurtemberg, the contract of insurance against fire is also held to be a commercial contract. Why should it be considered otherwise in England, the emporium of trade and commerce, where the amount of business done by these fire companies is so large? Not a single authority has been cited tending to shew, that there, they are not considered as commercial companies, or that their operations are not considered as commercial operations. On the contrary, in *Homen's Cyclopedia of Commerce*, *McGregor's Commercial Statistics*, *McCulloch's Commercial Dictionary*, these companies and their contracts are treated of, as falling under the commercial operations and the commercial law of England. In *Stephens' Commentaries*, Vol. 2, p. 127, an insurer is spoken of as a party "carrying on" a general *trade* or "business of insurance."

In *Levis' Manual of Mercantile Law*, paragraph 30, Joint Stock Companies are said to be under the Commercial Law of England, and also at paragraph 230, these Insurance Companies are said to be within the Mercantile Law. So in *Smith's Mercantile Law* and in *Chitty's Commercial and General Lawyer*. And Lord Mansfield, in *Carter vs. Boehm*, 3 Burr, 1,905, says that "Insurance is a contract upon speculation." This case it must be remarked was tried before a special jury of *merchants*, yet it was not a case of maritime insurance!

I really cannot see on what grounds under the English Law, a Fire Insurance Company can be said to be a non-commercial corporation. It is commercial, it seems to me, for the same reasons that make it so in France and in the rest of Europe, that is to say, because it is a Company doing the business of speculation on risks and hazards, because it trades on its contracts of indemnity—because it does the business of selling that indemnity. It is as commercial as the contract of mari-

time insurance, the character of which admits of no doubt (2 *Stephens' Commentaries*, 128), and in which, as in the contract of fire insurance, there is nothing but a contract of indemnity. (*Dalby v. India and London Life Insurance Company*, 15 C. B. 365.) What is trade? Trade is an occupation, employment or business carried on for gain or profit. (*Abbott's Law Dictionary*, 1879, v. *Trade*. Also, 1 *Holmes*, 30.) In the United States, as in England, this seems uncontroverted. In *Angell & Ames on Corporations*, insurance companies are classed among commercial corporations. In *Parson's Mercantile Law* and *Bryant & Stratton's Commercial Law*, fire insurance is treated of, as forming part of the commercial law. In the Civil Code of Louisiana, the contract of insurance was entirely left out, to form part of the Code of Commerce, which it was then intended to promulgate. But great stress is laid on the decision of the Supreme Court of the United States in *Paul v. Virginia* (8 *Wallace*, 168), where Field, J., said, that issuing a policy of insurance is not a transaction of commerce. This case is not binding on this Court; and a reference to the report shews that this is an *obiter dictum* of Mr. Justice Field, and that the gist of the decision in that case, is, merely, that insurance business done by a New York Company, in the State of Virginia, does not fall within the meaning of the clause of the constitution, which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States. Mr. Justice Field himself, in *Pensacola Telegraph Co. v. Western Telegraph Co.* (96 *U. S.* 2), explained what he said in *Paul v. Virginia*, as follows:—"In other words, the Court held that the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance made by a Corporation of one State upon property in another State was not a transaction of inter-state commerce. It would have been outside of the case for the Court to have expressed an opinion as to the power of Congress to authorize a foreign Corporation to do business in a State, upon the assumption that issuing a policy of insurance was a commercial transaction."

So the case of *Paul v. Virginia*, has no application whatever here. The relative positions of the Parliament of the Dominion of Canada, and the Legislatures of the various Provinces, are so entirely different from those of Congress and the Legislatures of the several States, that all decisions from the United States Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution. There, the right to regulate commerce *in* the State is

given to the State, not to the Federal power. Here, as said by Mr. Justice Strong, in *Severn v. the Queen* (2 Can. Supr. Court Reports, page 104): "That the regulation of trade and commerce *in the Provinces*, domestic and internal, as well as foreign and external, is by the British North America Act conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit."

In the United States Constitution, the word "commerce" only is used; ours has the words "*trade and commerce*." Some law dictionaries give the word "trade" as meaning "internal commerce," whilst the word commerce would refer to foreign intercourse. But this appears to be a fanciful distinction, not recognized either in common parlance or in legal language. In either one or the other, the expressions: "the trade with the West Indies, with the United States . . . the foreign trade," &c., are of every-day use, and, therefore, in the interpretation of the Imperial Act, we could not hold, it seems to me, that the word "trade" has been added to the word "commerce" simply to mean "internal commerce." Leaving it out of the Act, the internal commerce of the Dominion would remain as it is; under the control of the Federal power. Every word of the Act must have its due force and appropriate meaning, and the Imperial Parliament, which, no doubt, whilst creating a Federal union among its North American possessions, had before its eyes the Constitution of the United States, must have intended by adding this word "trade" to the word "commerce" to give to our Federal authority supreme power, not only, over the commerce, internal as well as external, but also over the trade of the whole Dominion, internal as well as external. To revert to the case of *Paul v. Virginia*, the *obiter dictum* of Mr. Justice Field "that issuing a policy of insurance is not a transaction of commerce," seems nothing but a truism. In the same sense, making a contract of sale is not a transaction of commerce. It is the fact of a person or corporation making a business of selling and buying, or of issuing policies of insurance, which gives to the contract of sale, or the contract of insurance, and to the seller or insurer, a commercial character. It is in accordance with this principle that the Civil Code of Lower Canada, Art. 2,470, says that *fire insurances are not by their nature commercial, but that they are so, when made for a premium by persons carrying on the business of insurers*.

So it is with the telegraphing business; for example, sending a message by telegraph is not a transaction of commerce, yet, telegraph companies, and the right to regulate them, are held in the United

States to be under the Federal power as a part of commerce, and this, though a very large proportion of the telegraphic messages have nothing to do with commerce at all. (*Western Union Telegraph Co. v. Atlantic and Pacific States Telegraph Co.*, 5 Nev. 102; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.) With us, on the same principle, telegraph business would also be exclusively under Federal control, if the British North America Act did not expressly vest in the Local Legislatures the control over local and provincial lines—so long as the Federal Parliament does not declare them to be for the general advantage of Canada.

Against the decision of *Paul v. Virginia*, in the United States, a decision in our own Courts can be cited; *Attorney General v. The Queen Insurance Co.* (21 L. C. J. 77; 22 L. C. J. 307), in which Mr. Justice Torrance in the Superior Court in Montreal, and the five judges of the Court of Appeal, unanimously held, that a license tax on *policies* of insurance was a regulation of trade and commerce, and, as such, under the British North America Act, *ultra vires* of the Provincial Legislatures. The case was carried to the Privy Council, and the judgment of the Quebec Courts was confirmed without hearing the respondents. The Privy Council, however, disposed of it without deciding whether the Provincial License Act on insurance policies was a matter falling within the words "regulation of trade and commerce" of the British North America Act. It may, nevertheless, be remarked, that their Lordships in their judgment, after saying that the price of a license to a trader is usually ascertained by the amount of his trade, add, referring to the license imposed by the Quebec Legislature on insurance policies, "this is not a payment depending in that sense on the amount of trade previously done by the trader"—calling insurance business a "trade" and insurance companies "traders."

Since Confederation, in many instances our Statutes have expressly or impliedly recognized Insurance Companies as trading companies. In the Insolvency Act of 1875 (38 Vic. cap. 16 sec. 1) it is enacted that the Act applies to traders and to trading companies, *except Insurance Companies*. Now, it is an admitted rule of interpretation that the exception of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general words, had the exception not been made. So that the opinion of the Federal Parliament must have been, when making the said exception in the said Statute, that Insurance Companies are trading Corporations. Moreover, in 32 and 33 Vic. cap. 12, sec. 3; 32 and

33 Vic. cap. 13, sec. 3 ; and 40 Vic. cap. 43, sec. 3, the Dominion Parliament has enacted that these Statutes should apply to any purposes or objects to which the legislative authority of the Parliament of Canada extends, *except insurance*. That is saying, clearly, that the legislative authority of the said Parliament extends to insurance. Indeed, the Dominion Parliament has given no uncertain sound on the question. Within the very first year of the Confederation (31 Vic. cap. 93) it exercised the power of legislation on the subject, and it has done so ever since, in no less than twenty-five Statutes passed thereon at various periods, as follows :—

1868,	31 Vic. Ch. 93.	1873,	36 Vic. Ch. 99.
1869,	32 & 33 Vic. Ch. 67.	1874,	37 " " 49.
"	" " " " 70.	"	" " " 86.
1870,	33 Vic. Ch. 58.	"	" " " 89.
1871,	34 " " 53.	"	" " " 94.
"	" " " 55.	"	" " " 95.
"	" " " 56.	1875,	38 " " 81.
1872,	35 " " 98.	"	" " " 83.
"	" " " 99.	"	" " " 84.
"	" " " 102.	1876,	39 " " 53, 54 & 55.
"	" " " 104.	1879,	42 " " 69.
"	" " " 105.		

To these may be added the six License Acts on Insurance Companies :—31 Vic. ch. 48 ; 34 Vic. ch. 9 ; 37 Vic. ch. 48 ; 38 Vic. ch. 20 ; 38 Vic. ch. 21 ; 40 Vic. ch. 42, in which the Dominion Parliament has also exercised the right to legislate on insurance and insurance companies, and to enact regulations on their trade and business, making at least (not including those of the session of 1880) thirty-one Statutes of the Federal Parliament which would fall to the ground as unconstitutional.

The Federal Parliament, in the general Railway Act of 1879, section 9, has enacted, as it had done in 1868 by the repealed Railway Act, that tenants in tail or for life, *grevés de substitutions*, guardians, curators, executors, and all trustees whatsoever, may contract and sell their lands to the company. This is certainly an enactment on property and civil rights, yet it has never been doubted, since the twelve years that it is on the statute book, that it is perfectly constitutional. Indeed, without it, the enactments of the Federal Parliament might be in some instances entirely defeated and set at nought. In the United States the Federal power has in the same manner exercised its jurisdic-

tion over civil rights and contracts. It having been settled, for instance, by judicial construction, that navigation was under Federal control, Congress has enacted laws regulating the form and nature of the contract of hiring the ships' crews. *Pomeroy's Constitutional Law*, Par. 381.

It has altered the obligations imposed by the common law on the contracts made by ship-owners as common carriers, and though the validity of this enactment has never been directly decided upon by the Supreme Court, it has been brought before that tribunal in such a way that their silence was equivalent to a positive and formal judgment in favor of its validity, as demonstrated in *Pomeroy's Constitutional Law*, Par. 384.

This Court has, in various cases, held, that the Federal Parliament on the matters left under its control by section 91 of the British North America Act, must have a free and unfettered exercise of its powers, notwithstanding that, by doing so, some of the powers left under provincial control by section 91 of the Act might be interfered with. And this doctrine has been approved of by the Privy Council as directly as possible in the case of *Cushing v. Dupuy*, decided a few weeks ago (April 15th, 1880), 3 *Leg. N.*, 171. In that case it was contended by the appellant that the provisions of the Dominion Insolvency Act were *ultra vires*, because they interfered with property and civil rights, as well as with the procedure in civil matters, all of which are assigned exclusively to the Provincial Legislatures by the British North America Act. But that contention was disapproved of by their lordships in the following terms:—"The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed, indeed, it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them." And their lordships have held that the Dominion Parliament had, in bankruptcy and insolvency, rightly exercised the power to revoke, alter or amend a certain article of the Quebec Code of Civil Procedure.

A bill to incorporate the Christian Brothers, as a Dominion body, which was referred to the Judges of this Court by the Senate in 1876, was reported by them to be unconstitutional, and *ultra vires* of the Federal Parliament (Journal of the Senate, 1876, pages 155, 206). This bill purported to incorporate a company of teachers for the Dominion, and consequently, as such, infringed on the powers of the Provincial Legislatures, in which is vested, by section 93 of the British North America Act, the exclusive control over Education, and the learned judges, by declaring it unconstitutional, recognized the principle that in a matter constitutionally provincial, the Federal Parliament has not the power to incorporate a company for the Dominion. And it is as clear upon the same principle that the Federal Parliament could not incorporate Insurance companies, nor legislate in any manner whatsoever on their trade and business, if insurance was a matter constitutionally provincial, that is to say, left under provincial control by the British North America Act.

If legislation on insurance is left to the Provincial Legislatures by the British North America Act, the Federal Parliament had not the power to create the Citizens' Insurance Company. If, on the contrary, the power of legislation over insurance is left to the Federal authority, then this power is supreme and exclusive: the Federal authority alone can regulate this trade in all its details, and the Ontario Statute, which purports to do so, is *ultra vires* and unconstitutional.

It cannot be, according to both the letter and spirit of the British North America Act, that one Government could have the right to incorporate these companies, and another Government the right to regulate them and their trade and business. It cannot be, that the Provincial Legislatures could thus have it in their power to impede, impair, obstruct, and even defeat the enactments of the Federal authority.

The laws promulgated by the Dominion—by the Federal Parliament—under the provisions of the Imperial Act, must have their full sway from the Atlantic to the Pacific, unrestrained by any other legislative body; free from provincial control, without hindrance from provincial legislation. On the application of this rule rests entirely for our country the safe-guards against clashing legislation; against concurrent jurisdiction; against interfering powers; against the repugnancy between the right in one Government to pull down what there is an acknowledged right in another to build up; against the incompatibility of the right in one Government to destroy what it is

the right in another to preserve (*McCulloch v. Maryland*). The Court of Appeal of Ontario goes so far as to say that an insurance company, created and authorized by the Dominion of Canada to do business throughout the whole Dominion, can be excluded from making contracts in the Province of Ontario by the Provincial Legislature; and there is no doubt that it is so, if the Provincial Legislatures, have, as held by the Ontario Courts, the power to regulate the insurance trade. This demonstrates conclusively that the Provincial Legislatures have not, and cannot have, such a power of regulation.

If the Ontario Legislature can exclude an insurance company from the Province of Ontario, it must be conceded that all the other Provincial Legislatures have the same right in their respective Provinces. So that, according to this theory, if all the Provincial Legislatures should exercise this right, a company created and authorized by the Federal Parliament to do business *all through the Dominion*, could not then do business *anywhere in the Dominion*.

What would be the use of a Dominion charter? Has the Imperial Parliament granted to the Federal authority a power so entirely useless and unsusceptible of any practical effect? The Constitutional Act does not bear an interpretation leading to such anomalous consequences; the powers of the Federal authority cannot, to such an extent, be dependent upon the consent and good-will of the Provincial authorities.

It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their influence, and it cannot be, that the framers of our constitution who determined to give to the Central power of this Dominion the supremacy and strength, which, in the hour of trial were found to be so much wanting in the Federal power of the United States, have thus given to a Province, or to all the Provinces uniting in a common legislation, the power to annihilate—either directly or indirectly—the corporation which the central power is authorized by the Act to create; it cannot be, that they have thus rendered inevitable in this Dominion, that conflict of powers under which a federation must always, sooner or later, crumble and break down.

These companies cannot be controlled and governed by as many different regulations as there are Provinces in the Dominion. It is by the comity of the Dominion that they are admitted here, and under the Dominion laws and power that they remain. One of the great benefits of Confederation would be lost if the rules on trade and com-

merce were not uniform all through the Dominion—if the Provincial Legislatures had the power to tamper with the grants and privileges conferred by the Federal authority on the trading and commercial bodies authorized to do business in this country.

I have not lost sight of certain enactments of the Federal Parliament, in which it seems to be admitted that the Provincial Legislatures have the right to incorporate insurance companies. But the Federal Parliament cannot amend the British North America Act, nor give, either expressly or impliedly, to the Local Legislatures, a power which the Imperial Act does not give them. This is clear, and has always been held in this Court to be the law. I have also not failed, as it was my duty to do, to give due consideration to the fact that the respondent appears to have in his favor the weight and authority of the opinions of the learned judges of the Province of Ontario, though I may here remark that the judges of the Court of Queen's Bench, in one of these cases (*Western Assurance Co. v. Johnston*), distinctly stated that they did not express their individual opinions on this constitutional question, but yielded to the judgments already given.

GWYNNE, J., also dissenting :

It is contended that the Act under consideration is *ultra vires* of the Provincial Legislature of Ontario which passed it, as interfering with the regulation of a branch of trade and commerce—control over which, is, by the 2nd item of Sec. 91 of B. N. A. Act, vested exclusively in the Dominion Parliament. The question thus raised is, undoubtedly, one of a very grave character, as became developed in the argument of the several cases now before us wherein this point was raised; one of which, namely, *The Western Assurance Co. v. Johnston*, was argued by the Attorney-General, who is also the Premier of the Province of Ontario, in support of the constitutionality of the Act. The question before us is not one merely affecting the particular Act in question, but, our judgment in this case, although the Dominion Parliament is not represented, and has not been heard in the matter, will logically affect some thirty Acts of the Dominion Parliament—whose constitutionality has not heretofore been questioned—and which must be *ultra vires* of the Parliament, if the Act now before us be *ultra vires* of the Provincial Legislature; and, on the contrary, if this Act be *ultra vires* of the Provincial Legislature, a number of Acts passed by the Legislature of the Province of Ontario must be equally so. It is clear, that the subject matter of the Act in question is not one over which jurisdiction is by the B. N. A. Act given concurrently

to the Provincial Legislatures and to the Parliament. If it were, no doubt the Act would be valid "*as long and as far only as it is not repugnant to any Act of the Parliament of Canada.*" The subject not being one over which concurrent jurisdiction is given to the Provincial Legislatures and to the Parliament, must be placed exclusively either under the one or the other. The question, therefore, is determinable by the Rule which I adopted in the *City of Fredericton v. The Queen*, as appearing to me to furnish an unerring guide in determining whether any given subject of legislation is within the jurisdiction of the Provincial Legislatures, or of the Parliament; namely: "All subjects of whatever nature, not exclusively assigned to the Local Legislatures, are placed under the supreme control of the Dominion Parliament, and no matter is exclusively assigned to the Local Legislatures unless it be within one of the subjects expressly enumerated in sec. 92, and at the same time does not involve any interference with any of the subjects enumerated in sec. 91."

The contention in support of the claim that the Act is within the jurisdiction of the Local Legislature, is, that the subject matter of the Act comes within item 13 of sec. 92 of the B. N. A. Act; namely "Property and Civil Rights in the Province."

I have already, in *City of Fredericton v. The Queen*, expressed my opinion, that the plain meaning of the closing sentence of sec. 91 is that (notwithstanding anything in the Act), any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so. Jurisdiction, therefore, "over Property and Civil Rights in the Province" is not vested *absolutely*, but only *qualifiedly*, in the Local Legislatures.

In so far as jurisdiction over "Property and Civil Rights," in every Province, may be deemed necessary for the perfect exercise of the exclusive jurisdiction given to the Dominion Parliament over the several subjects enumerated in sec. 91, it is vested in the Parliament, and what is vested in the Local Legislatures by item 13 of sec. 92, is only jurisdiction over so much of Property and Civil Rights as may remain, after deducting so much of jurisdiction over those subjects as may be deemed necessary for securing to the Parliament exclusive control over every one of the subjects enumerated in sec. 91—the residuum, in fact, not so absorbed by the jurisdiction conferred on the Parliament.

The only question therefore before us substantially, is: are or are

not joint stock companies, which are incorporated for the purpose of carrying on the business of Fire Insurance, traders? and is the business which they carry on—a trade?

If this question must be answered in the affirmative, the Act under consideration must be *ultra vires* of the Provincial Legislature as much as was the Act which in *Severn v. the Queen* was pronounced so to be, and, as the Act under consideration in *City of Fredericton v. the Queen* would have been, if passed by a Local Legislature; indeed, it seems to me to be difficult to conceive what greater assertion of jurisdiction to Regulate Trade and Commerce there could be, than is involved in the assumption and exercise of the right to prescribe by Act of the Legislature in what manner only, by what form of contract only, by what persons only, and subject to what conditions only, particular trades, or a particular trade, may be carried on, and to prohibit their being carried on otherwise than is prescribed by the Act. If this may be done in one trade, obviously it may be done in every trade, and so all trades must be subject to the will of the Legislature having jurisdiction so to legislate as to whether it shall be carried on at all or not. As to the Act under consideration, if it be open to the construction put upon it by the Courts below, it seems to be impossible to conceive any stronger instance of the assertion of Supreme Sovereign Legislative power to regulate and control the trade of Fire Insurance, and of Fire Insurance Companies, if the business of those companies be a trade. Now, among all the items enumerated in sec. 92, it is observable, that not one of them in terms indicates any or the slightest intention of conferring upon the Local Legislatures the power to interfere in any matter relating to Trade or Commerce, or, in any matter which in any manner affects any commercial business of any kind, unless it be item No. 10, whereby the Local Legislatures are empowered exclusively to make laws in relation to "local works and undertakings" subject to this qualification, namely, "other than such as are of the following classes:"

"1stly.—Lines of steam or other ships, railways, canals, telegraphs, and "other works and undertakings connecting the Province with any other or others "of the Provinces, or extending beyond the limits of the Province;

"2ndly.—Lines of steamships between the Province and any British or "foreign country; and

"3rdly.—Such works as, although wholly situate within the Province, are, "before or after their execution, declared by the Parliament of Canada to be for "the general advantage of Canada, or for the advantage of two or more of the "Provinces."

All these excepted subjects are, by item 29 of sec. 91, placed under the exclusive legislative authority of the Parliament of Canada, and so, by this closing paragraph of sec. 91, are, in effect, pronounced not to be Local or Provincial works or undertakings. Works and undertakings within each Province, other than these so excepted, are all, therefore, which can come within the description of "local works and undertakings" comprehended in item 10.

It is to be observed, also, that when power to incorporate Companies is given, no mention is made of trading companies. The power is expressly limited by item No. 11, sec. 92, to "The Incorporation of Companies *with Provincial objects*."

It is, perhaps, easier to say what the term does not comprehend, than to define it precisely. Such local works and undertakings as are by item 10 placed under the Local Legislatures may properly be termed Local or Provincial objects. So may the subjects enumerated in item No. 7, viz.: "The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province, other than marine hospitals," and so likewise the item specified in sec. 93, namely, "Education," and beyond these, I cannot say that I see any other. But, when we regard the whole scope and object of the B. N. A. Act, and bear in mind that the scheme of Constitutional Government, which it was designed to create, was to vest in the Dominion Parliament—consisting of Her Majesty herself (the Supreme Executive authority) as one member, and a Senate and House of Commons, as the other members of the Legislative body—the Supreme Sovereign Jurisdiction to legislate upon all subjects whatsoever, excepting only certain specific matters, *particularly* enumerated, purely of a local, domestic and private nature, which were assigned to the Provinces; and, when we find that for greater certainty, to expel doubt as it were, the exclusive legislative jurisdiction of Parliament is expressly declared to extend to all matters coming within "the regulation of trade and commerce;" (words which, in perfect character with the general supreme jurisdiction, intended to be conferred upon the Parliament—excepting only the *particularly* excepted subjects—are comprehensive enough to include and must be construed to include every trade and every thing relating to every trade, and to all branches of commerce and to the persons by whom, and to the manner in which, the same in every branch thereof, may be carried on) we can, I think, with great confidence, assert that no jurisdiction to *incorporate any Trading Company*, or to *restrain or control any Trading Company* in the

way it should carry on its trade, is given to the Local Legislatures; unless it be in respect of companies for the construction, maintenance and management of such works, as by item No. 10 are placed under the control of the Local Legislatures under the designation "local works and undertakings." From the frame of item No. 11, it is plain that what was intended by annexing the qualification "with Provincial objects," was not the power of incorporating companies for all purposes, but a limited power; for, inasmuch as, wholly irrespective of these words, the Local Legislatures could give no powers beyond their respective Provinces to companies incorporated by them, these words, "with Provincial objects" are superfluous, and have no sense unless they be read as words of limitation—having a restrictive operation; it would have been sufficient to have said, simply, "the incorporation of companies;" but "for greater certainty"—a principle which pervades the Act—these words "with Provincial objects" were introduced to confine the power to those purposes which are specifically placed under the control of the Local Legislatures in express terms—so as to leave nothing to be implied or inferred.

Are or are not joint stock companies which are incorporated for the purpose of carrying on the business of fire insurance, traders? and is the business so carried on by them, a trade?

It was admitted as beyond all question that the business of marine insurance is a trade, and that all companies carrying on that business are traders, and in all matters, subjected to the exclusive jurisdiction of the Dominion Parliament. But, marine insurance policies invariably contain, and from the time of their first introduction did contain, provisions for indemnity against loss by fire, and all text books upon the subject of insurance are careful to impress the doctrine—that *Fire* insurance, is but the offspring of marine insurance—that nothing was more natural or more reasonably to have been expected than the conversion of the security which had long afforded protection against injury to ships occasioned by fire, to the purpose of yielding protection to property on land—that it was the calamitous fire of London in 1667, which hastened the application of this provision in marine policies to the protection of property on land—and that, as Magens says, there were few merchants in London, in 1755, who were not insured as well for their protection as for the greater credit, both at home and abroad, which they enjoyed in their commercial transactions, from its being known that the great capitals lying in their houses and warehouses, were thus secured from the flames—that the utility, both in a public and a private point

of view, as an incentive to industry and enterprise and to the promotion and advancement of trade, is as great in contracts of fire insurance as in those of marine insurance, and indeed greater, by so much as the amount secured by contracts of insurance against fire, largely exceeds that secured by those against marine risks—that contracts of fire insurance are governed by the same general principles as marine policies, and that the solution of any question that may arise upon an insurance against fire, will be found by a careful application of the doctrine of marine insurance—and that the law most reasonably presumed originally, that persons who entered into contracts respecting fire insurance, were acquainted with, and *had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that these new contracts should be construed and controlled by the same means.*

No reason, therefore, exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be. The only difference in fact between them, is, that policies against fire are almost invariably effected by companies formed for the express purpose of carrying on the business—forming mercantile partnerships, having within themselves the desirable requisites of security, wealth and numbers, which afford them the means of defraying heavy losses—while marine insurance risks are usually taken by individuals.

That the Imperial Parliament had no doubt as to fire insurance companies being traders, and their business, a trade, appears from the Joint Stock Companies Act (7 and 8 Vic., Ch. 110), and the Companies Act of 1862, by the former of which all assurance companies or associations—whether for the purpose of insurance on lives, or against any contingency involving the duration of life, or against the risk of loss or damage *by fire*, or by storm or by other casualty, or against the risk of loss or damage to ships at sea or on a voyage, or to their cargoes, or for granting or purchasing annuities on lives—are, all alike, brought under the Act, and are obliged to be registered under the Board of Trade, and by the latter of which all were alike obliged to furnish half-yearly to the Board of Trade a full statement of the liabilities and assets of the companies, and by which also the *commercial* privilege of limited liability was extended to them. Neither do the members of the Mercantile Law Commission appointed in 1853, nor the legal and mercantile gentlemen to whom questions were submitted by that commission, appear to have had any doubt upon the point.

Against this position, supported by the above vast concurrence of opinion, and by the reason of the thing, we have been referred to some observations reported to have been made by Mr. Justice Field, in the Supreme Court of the United States, in *Paul v. Virginia* (8 Wallace, 168); but Mr. Justice Field himself explains, in the *Pensacola Telegraph Co. v. Western Telegraph Co.* (96 U. S., S. C., 21), that, all that was decided or intended to be decided in *Paul v. Virginia*, was :

“That the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by Corporations, but that a contract of insurance, made by a Corporation of one State upon property in another State, was not a transaction of *inter-state* commerce.”

The Parliament of Old Canada, which comprised the territory now constituting the Provinces of Quebec and Ontario, when applying to the Imperial Parliament for the passage of the B. N. A. Act, was not ignorant that by the Civil Code of Lower Canada (which was enacted into law by an Act of the Parliament of Old Canada) the contract of fire insurance, when made for a premium by persons carrying on the business of insurers, is a commercial contract. It was, therefore, upon the same basis as marine insurance, which, by the same article 2,470, of this Code, is declared to be always a commercial contract; and this is given not as a new, but as an old law. Now, it is impossible to conceive that the B. N. A. Act contemplated dealing with the same subject, as a branch of trade and commerce in one Province of the Dominion, and in another, as not—in one, as subject to the Dominion Parliament, in another, to the Local Legislature.

In England, fire insurance has always been regarded to be a trade equally with *marine* insurance, and to have emanated from the latter, and to be governed by the same principles and the same mercantile law as governed marine insurance. There can, therefore, be no doubt that in the contemplation of the B. N. A. Act, all insurance, whether of lives, or of real or personal property, and, whether against risk by fire on land or sea, or by storm on land or sea, or by any other casualty, must be equally regarded as branches of trade and commerce, and must, all alike, be under the jurisdiction of the Dominion Parliament. There can be no doubt that the object of the B. N. A. Act, in placing “*any matter coming within*” the term “*regulation of trade and commerce*,” under the exclusive control of the Dominion Parliament, was, to secure a perfect uniformity in all the Provinces of the Dominion as to *all matters whatsoever* affecting all trades, as an essential condition to the prosperous carrying on of trade, and, to prevent all possible inter-

The mischief of this legislation lies deeper than appears upon the surface. The germ of that mischief appears in the judgments of some of the learned Judges of the Court of Appeal in Ontario, and was more fully developed by the Attorney-General of Ontario in his argument before us, in *Johnston v. The Western Assurance Company*; the logical result of which, if well founded, would be to undermine the fabric which the B. N. A. Act designed to erect.

In the *Citizens' Assurance Company v. Parsons*, one of the learned Judges of the Court of Appeal in Ontario makes use of the following language:

"The Parliament of the Dominion has no power to authorize a Company, (that is, a Fire Insurance Company) of its creation, to make contracts in Ontario, except such as the Legislature of that Province may choose to sanction; they (that is, the Legislature of the Province) may, if they think proper, *exclude such corporation from entering into contracts of Insurance here, altogether*, or they may exact any security which they may deem reasonable for the performance of its contracts."

"The artificial being created by the charter is authorized to make such contracts as come within its designated purposes; but the Legislature granting the charter can give no privileges to be exercised within any of the Provinces, except with their assent and recognition, and it follows, as a matter of course, *that these may be granted upon such terms and conditions as the Provinces think fit to impose.*"

"Within their respective limits, each Legislature is supreme and free from any control by the other. The Dominion Parliament has no more authority to regulate contracts of this nature (that is to say, contracts of Fire Insurance), within any of the Provinces, than has the Legislature of the Province to attempt to regulate promissory notes or bills or bills of exchange. *The terms upon which insurance business is to be carried on within the Province is a matter coming exclusively within the powers of the Local Legislature*, and any legislation on the subject by the Dominion would be *ultra vires*. The Local Legislature has the exclusive discretion as to the conditions under which it (that is, the business of insurance) shall be carried on within the confines of this Province."

If this be law, it must be admitted that the imputation charged against the Dominion Parliament—that they have encroached upon the jurisdiction of the Local Legislatures—is well founded; in fact, it may be admitted that in every session of the Parliament's existence it has passed Acts which, if the above be law, would have to be pronounced

to be *ultra vires*, to the extent of invalidating from 30 to 40 Acts. If the Local Legislature had jurisdiction to pass the Act under consideration, it is obvious that it has the like jurisdiction over all other trades, so that what is asserted on behalf of the Local Legislatures is the *exclusive right to legislate in such a manner as to regulate and control all trades*, and to exclude “*if they think proper*,” *all persons and corporations, as well foreign as domestic, from carrying on their respective trades within the Province of Ontario*. The Local Legislatures have the right to so legislate, if they have power to pass the Act under consideration. But they have only the like power in each case; they have no more power or jurisdiction to pass the one species of Act than the other; they have no more power or jurisdiction to pass an Act to regulate or control the terms under which a trade may be carried on, than they have to prohibit it altogether from being carried on within the limits of the Province. The former power is indeed but the exercise of, and is comprehended in, the latter; for an Act to regulate and control a trade, is in effect, to prohibit the carrying on of the trade *at all, otherwise* than upon and subject to the prescribed regulations; but the right to exclude, for example, foreign traders, be they corporations or individuals, from carrying on their trade in a country, can only be asserted in virtue of, and as incident to, Supreme National Sovereignty. An Act of exclusion, equally with an Act to control and regulate the manner in which a trade shall be carried on, can only be vindicated upon the principles governing what is called the *Comity Nations*, the administration of which, belongs exclusively to *Supreme National Sovereignty*. Now the Provinces of the Dominion of Canada, by the wise precaution of the founders of our Constitution, are not invested with any attribute of National Sovereignty. The framers of our Constitution, having before their eyes the experience of the United States of America, have taken care that the B. N. A. Act should leave no doubt upon this subject.

Within this Dominion, the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part; these powers, are, within this Dominion, the sole administrators and guardians of the *Comity of Nations*. To prevent all possibility of the Local Legislatures creating any difficulties, embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing, violating, it might be, the *Comity of Nations*, all matters coming within those subjects are placed under

the exclusive jurisdiction of the Dominion Parliament. That the Act in question does usurp the jurisdiction of the Dominion Parliament, I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion.

The object of the B. N. A. Act was to lay in the Dominion Constitution the foundations of a Nation, and not to give to Provinces carved out of, and subordinated to the Dominion, anything of the nature of a National or *quasi* National existence.

True, it may be, that the Acts of the Local Legislatures affecting the particularly enumerated subjects placed by the B. N. A. Act under their exclusive control, if not disallowed by the Dominion Government, are supreme, in the sense that they cannot be called in question in any Court, but this supremacy is attributable solely to the authority of the B. N. A. Act, which has placed those subjects under the exclusive control of the Local Legislatures, and is not, in any respect, enjoyed as an incident to National Sovereignty.

To enjoy the supremacy so conferred by the B. N. A. Act, these Local Legislatures must be careful to confine the assumption of the exercise of powers so conferred upon them to the particular subjects expressly placed under their jurisdiction, and not to encroach upon subjects, which, being of national importance, are for that reason placed under the exclusive control of the Parliament.

How the species of legislation, which appears upon the Statute Books upon the subject of Insurance and Insurance Companies, came to be recognized (by which it would seem as if the Parliament and the Legislatures had been attempting to make among themselves a partition of jurisdiction, for which the B. N. A. Act gives no warrant whatever), appears to me very strange; for, it surely cannot admit of a doubt that *no Act* of the Dominion Parliament can give to the Local Legislatures jurisdiction over any subject, which, by the B. N. A. Act, is placed exclusively under the control of Parliament, and, as the Parliament cannot by Act or acquiescence transfer to the Local Legislatures any subject placed by the B. N. A. Act under the exclusive control of Parliament, so neither can it take from the Local Legislatures any subject placed by the same authority under *their* exclusive control. There is nothing in the B. N. A. Act to justify the conclusion that the subject of insurance is placed under the concurrent jurisdiction of the Local Legislatures and of the Parliament; if it were, the latter, could itself apply the necessary remedy by an Act controlling the legislation of the former. The subject then, not being

one of concurrent jurisdiction, must be under the *exclusive control*, either of the Parliament or of the Local Legislatures ; there can be no partition of the jurisdiction.

It is impossible to estimate the embarrassments which will be occasioned by the species of legislation which has been adopted, if not promptly checked and corrected. The only way of correcting the evil is to determine by an irreversible judicial decision, to which authority the exclusive jurisdiction belongs, namely, whether to the Parliament or to the Local Legislatures. In my judgment, it belongs, without doubt, to the Parliament.

The arrival, by the majority of this Court, at a contrary conclusion, will justly expose their judgment to the imputation that it will be impossible to reconcile that judgment with the principles upon which *Severn v. the Queen*, and, *The City of Fredericton v. the Queen*, have been decided ; and that it will have the effect of unsettling, rather than of settling the law, upon a most grave constitutional question.

FOURNIER, J., after stating the facts as shown at the beginning of the case p. 269, expressed himself as follows, in giving the judgment of the Court :—

This synopsis of the law shows that it was not intended to do more than to establish the proof to be given in certain cases, and to declare what shall be, in the Province of Ontario, the conditions which all contracts of insurance shall be subjected to, in accordance with the law. These provisions entirely relating to civil law, do not, in any way, prohibit the commerce of the assurers, neither do they declare that the policies which they issue are null and void. They are just and reasonable conditions, and, in fact, are almost similar to the conditions adopted by the majority of insurance companies. How then can it be said that this legislation in any wise refers to the power of regulating trade and commerce ? The subject matter to which it is applicable is the contract of insurance, and does not that belong to the civil law, and does it not come under the jurisdiction assigned to the Provinces, by paragraph thirteen of section 92 of the British North America Act, —“Property and Civil Rights ?”

No doubt the contract of insurance is extensively availed of in commerce as well as by non-traders, but, the object of a contract, does not change its character. Whatever may be its object, the contract of insurance is, nevertheless, a contract of indemnity, which is similar to a contract of guarantee, and, as such, belongs to the civil law. In commerce, contracts of sale, of exchange, and of bail are constantly employed and executed. Does it follow that any legislation in reference

thereto must be considered as being a regulation of commerce? If this be so, if everything which has reference to commerce could for this reason come under the exclusive control of the Federal power, the greater portion of the powers of the Provinces would thus become of no avail, for "commerce" in its most comprehensive meaning extends to everything. It is, as defined by a French author, "C'est échange de produits et de service. C'est en dernière analyse le fonds même de la société."

It is evident that this word cannot have in our Constitutional Act such an extensive meaning.

In order to determine the meaning of the words "Trade and Commerce," (§ 2 of Section 91,) they should not be read alone, but, on the contrary, they should be taken in connection with the whole of the provisions of the Constitutional Act, in order to arrive at a conclusion conformable to the spirit of the Act and to give effect to all its provisions.

In the case of *Severn v. The Queen*, I relied on the definition given by C. J. Marshall of the words "Regulation of Commerce" (which are in the Constitution of the United States) as follows: "That is, the power to regulate—that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself; may be exercised to its utmost extent, and acknowledges no limitations, other than those which are prescribed by the Constitution." I still adhere to the correctness of this definition. If we take it in its entirety, it is applicable to the question now under consideration, and will help us to solve it. We must, above all, not lose sight of the last words, "and acknowledges no limitations other than those which are prescribed by the Constitution." This restriction indicates that it is in the Constitution alone that the limitations of the power to regulate commerce will be found. After giving this power to the Federal Parliament by Paragraph 2, Section 91, the Statute gives to the Provinces, legislative control over property, civil rights, and matters of a merely local and private nature. This special power, exclusively assigned to the Provinces, cannot, by the terms of the Constitution itself be considered as coming under the power of regulating commerce. The regulation of trade and commerce must necessarily mean something else than legislation on property and civil rights, subjects, which belong exclusively to the Local Legislature. In exercising its power, the Federal Parliament no doubt has the right to incidentally entertain those matters which are under the jurisdiction of the Provinces, but

this power cannot extend any further than to what is just and reasonable and necessary, in order to legislate for commercial purposes only. The Federal Parliament could not, therefore, under the pretence of legislating on commerce, entirely control a subject matter which comes under the jurisdiction of the Provinces. Any legislation having reference to the regulation of commerce must be complete, but it need not necessarily destroy the jurisdiction of the Provinces over that part of the subject matter which is not affected by such legislation.

If this were not the case, whenever the Federal power, in exercise of its authority over commerce, should legislate in such a manner as to indirectly affect property and civil rights, it would follow, that all legislation over the subject matter would belong exclusively to the Federal Parliament, and the legislative power of the Provinces over the same matter would cease to exist. The decision of the Privy Council, in the case of *L'Union St. Jacques v. Belisle* (*L. R. 6, P. C. 36*), has enunciated a principle which, applied to this case, enables us to reconcile the exercise of their respective powers, by the Federal Parliament and Provincial Legislatures. If this construction is not the proper one, what would be the consequence of legislation on the subject of marriage? The Federal Government has jurisdiction over marriage and divorce; the jurisdiction of the Provinces is limited to the solemnization of marriage, which means the formalities required previous to marriage. Now the general expression, "marriage and divorce," literally interpreted, is susceptible of a very extensive meaning. Could the Federal Parliament, in such a case, on the ground that the legislation over marriage is assigned to it, extend its jurisdiction so as to regulate the civil conditions of the contract, such as dower, community of goods, and thus exclude the jurisdiction of the Provinces over that portion of the civil law. On the contrary, is it not evident that the Federal Parliament should confine its legislation strictly to the conditions which have reference to the capacity or incapacity of contracting marriage, and to reasons for prohibition, and to other conditions relating to the character of that contract, without interfering with the civil rights appertaining thereto. This general expression, in paragraph 26, section 91, "Marriage and Divorce," gives us another example of the use made in the Constitutional Act of expressions which must have a limited meaning by the other provisions of the same Act. Cannot the same process of reasoning apply in construing the power of regulating trade and commerce?

In order to reconcile the exercise of these powers, I have arrived at

the conclusion, in a case such as the one now under consideration, that the Provincial jurisdiction is only limited by the exercise by the Federal Parliament of its power, in so far as the latter is competent to exercise it, and that, the Province can still exercise its power over that portion of the subject matter over which it has jurisdiction, provided the Provincial Legislation does not directly conflict with the Federal Legislation. This interpretation seems to be supported by the following authority—*Story 1st Vol. Stat. & Const. Law, Sec. 1,067*: “A grant of power to regulate, necessarily excludes the action of all others who would perform the same operation on the same thing.” The question therefore is,—is there any Federal legislation on the same subject—*same operation on the same thing*? It is quite true that the Parliament of Canada has passed several statutes relating to insurance companies, prior and subsequent to the law now under consideration. Without wishing to enter into a minute examination of this legislation, I will, however, refer to some of its principal provisions, in order to shew that there is no conflict between the Federal laws and the Statute passed by the Legislature of Ontario. The Statute 40 Vic. Ch. 42, which amends, consolidates and repeals the previous legislation (the first Act being 31 Vic. Ch. 48), passed by the Federal Parliament, in reference to the subject matter of insurance, enacts several provisions, the object of which is clearly to protect the public against any loss which might result from companies being irresponsible. The companies to which this legislation applies are first obliged to take out a license, without which they cannot transact any business. They must afterwards deposit in the hands of the Minister of Finance the sum of \$100,000 as security for the holders of their policies of insurance. They must also file in the Department of Finance, and also in the offices of the Superior Courts having jurisdiction where they transact business, a copy of their charter of incorporation, as well as a power of attorney on the part of the Company to its principal manager in the form prescribed, with a declaration that the service of any writ or proceeding against the Company can be made at the office of such agent or manager. They must as well furnish complete and detailed statistics of their business, and notify any change with respect to their head office, give notice that they have obtained a license, and also notify when they cease to do business. Special provisions are enacted, with a view of winding up such companies in case of their insolvency. Lastly, they are subject to the inspection and supervision of an inspector, who is given sufficient authority for the carrying out of the provisions of the Act.

These provisions, it is clear, have nothing whatever to do with respect to the *contract of insurance*, but are only for the purpose of subjecting the insurer, in the exercise of his trade as such, to certain regulations established for the protection of the public. This legislation does not impose any conditions which necessarily form part of the contract.

We find, therefore, that the Federal legislation does not in anywise affect the nature of the contract of insurance, nor the conditions forming part of such contract, and that the legislation of Ontario, now under consideration, deals exclusively with that subject,—both legislations deriving their respective powers from different sources—the first from the power of regulating trade and commerce, and the other from the power of legislating over civil rights and property. Why, if the provisions of these laws are neither conflicting nor antagonistic to one another, can we not hold that both are constitutional? I see between them, no conflict, no obstacle, to their being carried into operation.

This view of the case is supported by the following authority, *Pomeroy on Constitutional Law*, page 218, "So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from the other which remains with the State, and may be executed by the same means. All experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

Although it is possible to thus reconcile these legislations, is it not evident, however, that the Act passed by the Legislature of Ontario, relating exclusively to the proof to be made in case of loss, and to the nature of the conditions of contracts of insurance effected in the Province of Ontario, is *intra vires*? for the issuing of a policy of insurance is not necessarily a commercial transaction; it is certainly not one, on the part of the assured, although, by the Civil Code of the Province of Quebec, it is a commercial transaction on the part of the assurer. Pardessus, *Droit Commercial*, says:—"Elles (les conventions d'assurance) ne sont pas, par leur nature, des actes de commerce de la part de ceux qui se font assurer—mais comme presque toujours de la part de ceux qui assurent elles sont de véritables spéculations, c'est sous ce

point de vue que nous les considérons comme actes de commerce et que nous avons cru devoir en faire connaître les principes." It is the same in England; insurance is a commercial transaction, although the contract of insurance itself forms part of the civil law. In our Constitutional Act I cannot find anywhere, that commercial law is under the jurisdiction of the Dominion; it seems to me, on the contrary, that the Act, by assigning specifically to the Dominion, legislative control over a part of the commercial law, such as any law on Navigation, Banking, Bills of Exchange, Promissory Notes, and Insolvency, has left the residue to the jurisdiction of the several Provinces as coming under the head "civil law."

In this view of the case, the Act now under consideration would derive its authority from the power of the Provinces to legislate on civil rights. It is on this principle that the case of *Paul v. Virginia* (8 Wallace 168) was decided. A law passed by the State of Virginia enacted that Insurance Companies, not having been incorporated under the laws of the State, could not transact any business within the limits of the State without previously taking out a license and depositing a certain sum as security for the rights of the assured. The plaintiff contended that the law was unconstitutional, because it was contrary to the power of Congress to regulate trade and commerce. Mr. Justice Field, who delivered the judgment of the Court, makes use of the following language :

Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the Corporation and the assured for a consideration paid by the latter.

According to this decision, the Legislature of Ontario had power to pass the law in question as being a part of civil law.

But there is also another argument which I consider conclusive; it is, as will be seen hereafter, the recognition by the Federal Parliament of the right of the Local Legislatures to legislate on this subject. Although, by paragraph 11 of section 92, power is given to the Provinces to incorporate companies for *provincial objects*, it has, however, been contended that these words are not sufficient to comprise the power to incorporate Insurance Companies. The terms, however, are sufficiently comprehensive to include Insurance Companies. If it is objected that the object of an Insurance Company is not *Provincial*, in the sense that its object has not an interest for the whole Province, that is to say, a public interest; I answer, by saying that the object is to transact business throughout the Province. This

must be the interpretation to be given to these words, if they are to have any signification whatever. They certainly would have no meaning whatever, if they were interpreted as giving the power only of incorporating companies having a public Provincial interest. Such an interpretation would be equivalent to saying that the Government could delegate its functions to corporations, and have them exercised by them, and that they have no power to incorporate companies for the purpose of commerce, industry, trade, &c., &c. They certainly have, in my opinion, that power, provided the companies thus incorporated, confine their operations within the limits of such Province. If they desire to go outside of the Province, they come under the provisions of the Federal law, to which they must conform, and which contains special provisions for such event.

This power of incorporating companies, exercised by the Legislature of Ontario, has been recognized by Federal legislation, as belonging to Provincial Legislatures. Sec. 28 of 40 Vic. Ch. 42, enacts: "This Act shall not apply to any company within the exclusive control of any one of the Provinces of Canada, unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout Canada."

The first section of this Act makes the laws respecting insolvency applicable to insurance companies incorporated by the Parliament of Canada, as well as to those incorporated prior to and after Confederation, by the Legislature of any Province now constituting Canada. We also find in the 30th section of the same Act another recognition of the power of the Provinces to legislate on the subject of insurance. Doubts having been raised as to the validity of a certain Ontario Statute relating to mutual insurance companies, this section of the Federal Act declares that only such provisions as are within the jurisdiction of the Federal Parliament are repealed. In this section there is not only the formal recognition of this power in the Province, but there is also this important declaration, that the Act repeals only that part of its provisions involving a conflict of power. It is a formal admission that this subject matter, when treated in its commercial aspect, is within the control of the Federal Parliament, whilst, when regarded as relating to civil rights, such as involving the form and nature of the conditions of insurance, it remains under the control of the Provincial Legislature. This also confirms the opinion above

stated, as to the restrictions which the Federal and the Provincial Governments must impose upon themselves in the exercise of their respective powers, in order to keep within the limits of their jurisdiction. It is true that the exercise of a power would not be a sufficient reason, in many cases, for declaring that it legally exists, but in a case such as the one now under consideration, where there are cogent reasons for exercising this power in a limited manner—as it has been by 40 Vic., Ch. 42, recognizing the power of the Provinces—which seem equally well founded, we may fairly presume that the accord of both Legislatures to keep themselves within the limit of their respective powers, was for the purpose of exercising such powers as properly belonged to them respectively. The most important public Departments, such as the Department of Justice, the Department of Finance, have for some years past adopted this view of the law, by seeing that the requirements of the several Federal laws relating to insurance were strictly complied with. Such an interpretation could not prevail, no doubt, against a judicial decision, but, in the absence of the latter, the interpretation given by the Departments must have great weight. Story thus speaks of the value of the same (*Constitution of the United States, Vol. I., No. 408*): “And, after all, the most unexceptional source of collateral interpretation is from the practical expositions of the Government itself and of its various Departments, upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial exposition, and have the same general recommendation that belongs to the latter.”

This departmental interpretation has been acted upon for several years; the license fees have been collected, and statistics have been furnished, without any contention on the part of the Provinces; and the power exercised in virtue of the law of Ontario was not contested by the Federal Government, who had the authority to disallow the Act had they considered it *ultra vires*. When both Governments are in accord, and in order to dispel any doubts, specially legislate, would it not be unwise to substitute another interpretation to theirs? If there were any doubt on the matter, it seems to me, to have been settled by legislative interpretation, and all the tribunals have to do, is to conform themselves thereto. Thus, besides the reasons I have given above in favor of the law of Ontario, there is also in its favor, administrative interpretation and legislative interpretation. If I do not add, judicial exposition of the Ontario Courts, it is because their decisions are being

appealed from ; but, it is nevertheless, of the greatest weight, as it has been the unanimous opinion of all the Judges who have been called upon to pronounce upon this question. In addition to this, we have this decision supported by the Supreme Court of the United States in the case of *Paul v. Virginia*.....,.....

Besides the question raised as to the constitutionality of the Act, the Company (appellant) contends that, because it has been incorporated by the Parliament of Great Britain, it is not subject to provisions of the Act now under consideration. Whatever may be the origin of these corporations, whether they owe their existence to the Parliament of the Dominion or to the Provincial Legislatures, or to a foreign power, they are nevertheless, in the one case as the other, subject, in order to exercise their franchise, to the conditions which may be imposed upon them by the laws of the country where they desire to exercise such franchise. These corporations are in reality, only commercial associations, which only differ from ordinary commercial partnerships as to the limited liability of the members thereof. The Federal Statute, by the first section, treats them as ordinary associations of individuals transacting insurance business. These corporations cannot, any more than other associations, set themselves above the law, to which they are obliged to conform. Our large commercial houses, which have branch houses in the different Provinces of the Dominion as well as in foreign countries, have never for a moment pretended that they could set themselves above the laws of the Provinces or countries in which they carry on business, and claim, that they should be subject only to the laws in force at their principal place of business. Whatever may be the inconvenience, are they not obliged in all their contracts to conform themselves to the laws of the country where they carry on business ? It would, no doubt, be much simpler and more advantageous for insurance companies, to have the power of themselves determining their conditions, and of imposing them in all countries where they might open offices. Would not this be putting them above the law ? Far from recognizing that they have such privileges, numerous authorities and judicial decisions agree to the contrary. This point has already been decided in the case of *Paul v. Virginia* already cited, in which Mr. Justice Field says :—" A recognition of its existence (corporation) even by the other States, and the enforcement of its contracts made therein, depend greatly on the comity of those States, a comity which is never extended when the existence of the corporation or the exercise of its power is prejudicial to their interest, or repugnant to their interest.

They may exclude this foreign corporation, they may restrict its business to particular localities, or they may exact security for the performance of its contracts with their citizens, as in their judgment will best promote the public interest."

It is hardly necessary to cite authorities on this point, as it is only the application of the elementary rule "*locus regit actum*." I will cite, however, the following, as it contains the opinion of the author of the "*Traité du droit de la nature et des gens*," *Alaruzet*, Vol. 1, No. 194, page 361 :—" Lorsque la justice est applicable à des navires armés et équipés en France quoique étrangers, les dispositions de la loi française doivent être suivies. La cour de Cassation a eu occasion d'examiner cette question et l'a résolue dans ce sens." Merlin qui rapporte cet arrêt l'approuve. "Sur cette question, disait Mr. Daniel, organe du ministère public, rien n'est plus constant que le principe invoqué par les demandeurs et développé par Puffendorf—quiconque passe un contrat dans les terres d'un souverain, se soumet aux lois du pays et devient en quelque manière, sujet passager de cet état."

The Company appellant also contends, that their conditions being in substance similar to the statutory conditions, they may avail themselves of the statutory conditions, and yet, not comply with the requirements imposed by the Statute ; that is to say, in my opinion, because they have evaded the law, they should have the same right as though they had complied with it. It seems clear that when a company does not have the statutory conditions printed, as prescribed by Section 4, the third section provides that they may form part of the policy "as against the insurers," leaving it optional to the insured to take advantage of them or not, the insurance, then, being subject to such conditions which result from the law bearing on the subject of contracts of insurance. I do not presume here to discuss this point, as it has been so often before the Courts of Ontario, and as the large majority of the judges have given their opinion in favor of this construction of the Act. It is sufficient to say that I entirely concur with the opinion expressed by the learned C. J., Moss, on this point, in the cases now before us.

HENRY, J. :—

Several important questions were raised and argued in this case, not the least of which, was that, as to the constitutionality of the Act of Ontario, which provides for conditions in policies for fire insurance such as that which is now contested by the appellants. I have arrived at the conclusion that the Act is *intra vires*. It is contended that, inasmuch as "the regulation of trade and commerce," by the 91st Section

of the British North America Act is specifically given to the Parliament of Canada, there is no power in a Local Legislature to regulate, by enactment, the rights of insurers and those they insure against loss or damage by fire. It is also contended that, if it be not so, the Local Legislature might, by the imposition of conditions and restrictions, frustrate the object of a Company chartered or incorporated, by, or under, an Imperial Act, as is the case with the appellant's Company, or by or under an Act of the Parliament of Canada. The contention may or may not be well founded, and besides, the settlement either way, cannot affect the main question. But local legislation has not yet reached that point, if it ever does, it will be time enough to deal with that position when it arises. If the power to regulate the matters in question be with the Local Legislature, it is not easy to find the authority to question, control, or limit its exercise.

We must construe the words of section 91 which I have quoted, *by the whole Act* and the several important objects in view, and be governed by what is intended by it. The *regulation* of trade and commerce is a very comprehensive, but, at the same time, a very indefinite and vague term, and, if construed in its comprehensive meaning, would include a great variety of subjects which we find specifically added in the list of subjects given to the Parliament of Canada, such as, for example, "Beacons, Buoys, Lighthouses," "Navigation and Shipping," "Quarantine and the Establishment of Marine Hospitals," "Currency and Coinage," "Banking, incorporation of Banks, and the issue of Paper Money," "Bills of Exchange and Promissory Notes," "Interest," "Legal Tender," "Bankruptcy and Insolvency," and others. From this it may be fairly assumed the term was used in some generic, but, at the same time, qualified sense, and not intended to apply to the regulation of trade and commerce in regard to all subjects that may be found to contribute to the one or the other. The operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements, and expenditure of labor employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged in producing and supplying lumber, iron, or other materials for manufacturing purposes, may all be said to be intimately connected with trade and commerce, and to be included in the general term used; and if they were not shown by the whole Act and its objects to be excepted, we might possibly conclude them to have been intentionally included. The matters just referred to, all tend to contribute

to, and create trade and commerce; but Fire Insurance Companies may operate, as they do in some cases, only in respect to agricultural buildings, which but very remotely have any effect on the trade and commerce of the country. If organized for local operation, we find, by number eleven of the list of subjects given to the Local Legislatures, the charters are to be granted by them. "The Incorporation of Companies with Provincial objects" are the words used. But apart from these considerations, "Property and civil rights in the Province" being within the power of the Local Legislatures, we must determine the extent to which, if any, the power to deal with them is necessarily restrained, and what limitation of them the British Parliament intended to provide in reference to the exercise of this power by giving to Parliament "The Regulation of Trade and Commerce."

From the peculiar distribution of the legislative powers, and the mode adopted, it was a difficult undertaking to legislate so as to prevent difficulties arising, but they are to be properly resolved, only, by keeping prominently in view the leading objects intended to be provided for. Looking only at number 26 in the list contained in Section 91, and finding the words "Marriage and Divorce," we would at once conclude that those words included everything with respect to those subjects; but in number 12 of Section 92 we find "The solemnization of Marriage in the Province" is expressly given to the Local Legislatures. No doubt can be entertained, that, considering *both* provisions, notwithstanding any other provision of the Act, the intention was probably to give the power to regulate the Solemnization of Marriage, to the Local Legislatures. The two cases are not exactly alike, but still it shows no one part of the Act should be alone looked at.

The incorporation of Fire Insurance Companies with Provincial objects being given to the Local Legislatures, they can, as to them, prescribe conditions and terms for the conduct of the business, and regulate the rights of the Companies and those dealing with them. With the power to deal with the whole subject of property, real and personal, and civil rights, and the right to prescribe and regulate, as just stated, in respect to the incorporation of Companies with Provincial objects, it would be unreasonable to conclude they were intended to have no power to apply the same or similar conditions to the dealings of other Companies chartered outside. It would be, I think, improper to conclude that the Imperial Parliament, in the use of the words "the regulation of trade and commerce," in the peculiar connection in which we find them, could have intended them to apply, not only to the *regula-*

tion of trade and commerce, as generally understood, but to all trading and commercial contracts, so as to limit the operation of the provision giving specifically, the subject of property and civil rights to the Local Legislatures.

If once decided that contracts for fire insurance are necessarily beyond the powers of the Local Legislatures, where can a line be drawn to save to them the power to legislate touching the wages and contracts connected with manufacturing, mercantile or other transactions, or in respect to liens on personal estate in the shape of stocks of goods, or in respect to mercantile shops or warehouses.

The words of a Statute, unless the context shows otherwise, or they have a technical meaning, are to be construed according to their well understood and accustomed meaning. "Trade" means the act or business of exchanging commodities by barter, or the business of buying and selling for money—commerce—traffic—barter; it means the giving of one article for another for money, or money's worth. "Commerce" is only another term for the same thing. Neither of the terms, includes the rules of law, by which parties engaged in trade or commerce are bound to each other, but, when their *regulation* is given to a legislative body, it must be assumed the intention was, that control in some respects was to be exercised; but, to what extent, we must judge in this case by taking the whole Act into consideration.

The Dominion Parliament has power to enact general regulations in regard to trade and commerce, but not to interfere with the powers of the Local Legislatures in the matter of local contracts, amongst which, are properly included policies of insurance against loss by fire on property in the respective Provinces.

"To regulate" trade, may remotely, affect some of the conditions and terms under which articles are produced, but not necessarily so; and the regulation of it may consist only in rules governing the disposition or sale of goods, or may include conditions under which goods are manufactured, by which they become liable to duty. The term or expression "Regulation of trade and commerce" cannot, under the Imperial Act, be construed to extend to and include contracts for the erection, purchase, or renting of warehouses, manufactories, or shops used for trading or commercial purposes.

In some of the cases I have put, trade and commerce would be regulated—in the others, they might be affected, but only incidentally, by the laws regulating contracts; nor is it, I think, at all necessary under the Act, that they should be construed to regulate *contracts*.

This view is in accordance with the decision of the Supreme Court of the United States, in *Paul v. Virginia*, cited in this case by the learned Chief Justice of Ontario, and which, in the absence of English authorities, I feel at liberty to adopt.

I was of the majority of this Court who decided against the constitutionality of the Act of Ontario under which the case of *Severn and the Queen* came before us; but that case was essentially different from this, as will appear by a comparison of my reasons in the two cases.

CHIEF JUSTICE RITCHIE :—

There never, probably, was an Act, the validity of which was questioned, that came before a Court so strongly supported by judicial and legislative authority as this Act. It was legislation suggested as necessary by the Court of Queen's Bench of Ontario, in the case of *Smith v. Commercial Union Insurance Co.* (33 U. C., Q. B. 69.)

The Legislature of Ontario, adopting the suggestion, passed 38 Vic., Cap. LXV., authorizing the issue of a commission to three or more persons holding judicial office in the Provinces, and by Section 2, enacted in these words, that

“ A commission is to be issued by the Lieutenant-Governor, addressed to
 “ three or more persons holding judicial office in this Province, for the purpose
 “ of determining what conditions of a fire insurance policy are just and reasonable
 “ conditions; and the Commissioners may take evidence, and are to hear such
 “ parties interested as they shall think necessary; and a copy of the conditions
 “ settled, approved of and signed by the Commissioners, or a majority of them,
 “ shall be deposited in the office of the Provincial Secretary; and in case, after
 “ the Lieutenant-Governor, by proclamation published in the *Ontario Gazette*,
 “ assent to the said conditions, any policy is entered into or renewed, containing
 “ or including any conditions other than or different from the conditions so
 “ previously approved of and deposited; and if the said condition, so not con-
 “ tained or included, is held by the Court or Judge before whom a question
 “ relating thereto is tried, be not just and reasonable, such condition shall be
 “ null and void.”

This Act was not disallowed, and a commission by the Government of Ontario was duly issued in accordance therewith to learned judges, who reported what they deemed just and reasonable conditions, whereupon the Ontario Legislature passed the 39 Vic., Cap. XXIV., “An Act to secure uniform conditions in Policies of Fire Insurance,” which is the Act now questioned, and which, after reciting that under the provisions of the Act, 38 Vic., Cap. LXV., the Lieutenant-Governor issued a commission to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies, on

real or personal property, in this Province (Ontario), and, after reciting that a majority of the Commission had settled and approved of the conditions set forth in the schedule of the Act, and that it was advisable that the same should be expressly adopted by the Legislature as the statutory conditions to be contained in the policies of fire insurance entered into, or in force in this Province :

The first sections enact :—

1. The conditions set forth in the schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereinafter entered into or renewed, or otherwise in force, in Ontario, with respect to any property therein, and shall be printed on every such policy, with the heading "Statutory Conditions," and if a Company (or other insurer) desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added, in conspicuous type, and in ink of different color, words to the following effect :—Variations in conditions—" This policy is issued on the above statutory conditions, with the following variations and conditions :—These variations (or as the case may be) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by " the Company."

2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition or omission shall be legal or binding on the insured ; and no question shall be considered as to whether any such variation, addition or omission is, under the circumstances, just and reasonable, and, on the contrary, the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions or omissions, are distinctly indicated and set forth in the manner or to the effect aforesaid.

This Act was never disallowed, but has since its passage been acted on ; and the Ontario Reports show that questions as to its construction have been before the Courts of Ontario, without its validity having been impugned by either Bench or Bar ; and, when the point was raised, its validity was affirmed by the unanimous opinion of the Court to whom the question was first submitted ; it was so held and acquiesced in, in two cases unappealed from, and, when again raised in the present cases, the Court of Queen's Bench unanimously re-affirmed its former decision and, on appeal, the Appeal Court of Ontario unanimously affirmed that decision. But this is not all ; we have the Dominion Parliament recognizing, by expressed statutory terms, the right of the Local Legislature to incorporate Insurance Companies and to deal with insurance matters.

So far back as the 31 Vic. ch. 48 (1868)—when the intention of the Parliament of Great Britain, in enacting the British North America Act must have been fresh in the minds of the leading men who first sat in

the Dominion Parliament, and who had taken the most prominent part in discussing and agreeing on the terms of Confederation and the provisions of the British North America Act, and who, we historically know, watched its passage through the Parliament of Great Britain,—we find the Dominion Parliament in that year (1868) passing “An Act respecting Insurance Companies,” and in that Act, by Section 4, thus clearly affirming the right of the Local Legislature to incorporate Insurance Companies—after fixing the amount to be deposited by Life, Fire, Inland Marine, Guarantee and Accident Insurance Companies, certain Companies are excepted in these words :—

Except only in the case of Companies incorporated before the passing of this Act, by Act of the Parliament of Canada, or of the Legislature of any of the late Provinces of Canada, or Lower Canada or Upper Canada, or of Nova Scotia or New Brunswick, or which may have been or may *hereafter be incorporated* by the Parliament of Canada, or *by the Legislature of any Province of the Dominion, and carrying on the business of Life or Fire Insurance.*

And, as if to place this beyond all doubt, and to show that Companies which might be so incorporated by the Local Legislature were local in corporations, and their business should be confined within the Province incorporating them, we find it enacted in Section 25 :

That the provisions of this Act as to deposit and issue of license shall not apply to any Insurance Company incorporated by any Act of the Legislature of the late Province of Canada, or incorporated, *or to be incorporated, under any Act of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick*, so long as it shall not carry on business in the Dominion *beyond the limits of that Province* by the Legislature or Government of which it was incorporated, but it shall be lawful for any *such Company to avail itself* of the provisions of this Act.

Could words or provisions, in recognition and affirmance of the powers of the Local Legislatures, be stronger ? and in 38 Vic., Cap. 20 (1875), “An Act to amend and consolidate the several Acts respecting insurance, in so far as regards Fire and Inland Marine business,” we find, by Section 2, a distinct recognition of Companies incorporated under any Act of the Legislature of any Province of the Dominion of Canada.

Section 2.—This Act shall apply only to Companies heretofore incorporated.

38 Vic. Chap. 20 ; Sec. 1, Sub-Sec. 1.

1. “Canadian Company” means a Company incorporated in Canada, for purposes of Fire or Inland Marine Insurance business, or both, in Canada, and having its head office therein, and entitled, under the second section of this Act, to receive a license as such.

2. "Foreign Company" means a Company incorporated, or duly established, according to the laws of any foreign country (including the United Kingdom), for the purposes of Fire or Inland Marine Insurance business, or both, and entitled, under the second section of this Act, to receive a license as such in the Dominion of Canada.

Section 2.—This Act shall apply only to Companies *heretofore* incorporated by any Act of the Legislature of the late Province of Canada, *or by any Act of the Legislature of any of the Provinces of Canada*, and which, upon the day of the passing of this Act, were also licensed, under Act of the Parliament of Canada, to transact business of insurance in Canada, *and also to any Company heretofore or which may hereafter be incorporated by Act of Parliament of Canada*, and to any foreign insurance Company *as hereinbefore defined* (viz. : a Company incorporated in Canada); and it shall not be lawful for the Minister of Finance to license any other Company than those in this section above mentioned; and no other Company than those above mentioned shall do any business of Fire or Inland Marine Insurance throughout the Dominion of Canada; but nothing herein contained shall prevent any Insurance Company incorporated by, or under, any Act of the Legislature of the late Province of Canada, *or of any Province of the Dominion of Canada*, from carrying on any business of insurance within the limits of the late Province of Canada, *or of such Province only*, according to the powers granted to such Insurance Company within such limits as aforesaid, without such license as hereinafter mentioned.

But the Dominion Statutory recognition of the rights of the Local Legislation, strong as it is, does not rest here. As late as 1877, by the 40 Vic. Cap. 42, "An Act to amend and consolidate certain Acts respecting insurance," we find it thus enacted by section 28 :—

"This Act shall not apply to any Company *within the exclusive Legislative control of any one of the Provinces of Canada unless such Company so desires*, and it shall be lawful for any such Company to avail itself of the provisions of this Act, and if it do so avail itself, such Company shall then have the power of transacting its business of insurance throughout Canada."

So again, in the year 1878, the Dominion Parliament distinctly recognized the incorporation by the Ontario Legislature of the Ontario Mutual Life Assurance Company, *incorporated and carrying on business in the Province of Ontario*, under the Act, chap. 17 of the Statutes of said Province, passed in the 32 Vic., and incorporated the said Company to enable it to carry on business of Life Assurance on the Mutual principle, and doing all things appertaining thereto connected therewith, *as well in the said Province of Ontario as in the other Provinces of the Dominion*.....

We find, then, legislation in the direction carried out by this Act, recommended in a solemn judgment of the Queen's Bench of Ontario;

we find the matter referred to a Commission of Judges who reported to the Government of Ontario, the conditions and provisions which, in their opinion should be enacted by the Legislature of that Province, and form, as against the insured, the statutory conditions of a policy of insurance in force in Ontario with respect to any property therein, and the means necessary to be adopted by the insured if he desire to omit or vary any of such conditions. Here then, we have the Legislature of Ontario assuming the right to deal with Insurance Companies and Insurance business, and their legislative action not disallowed. We find this particular Act in several cases acted upon by the Bar and Bench of Ontario without its validity being questioned by either. When at last questioned, we find its validity sustained by all Courts and Judges of original jurisdiction who have been called on to adjudicate on this point, and, finally, by the unanimous opinion of the Court of Appeal; and last, but not least, we have the express legislation of the Parliament of Canada expressly recognizing that the Local Legislatures have power to deal with matters of Insurance.

I do not put forward these considerations as conclusive of the questions in this Court of Appeal, because, if we were clearly of opinion that under the B. N. A. Act the Legislature of Ontario had not the power to pass the law, we would be bound to say so and to over-rule the decisions of the Courts below and disregard the legislation of the Dominion Parliament; for, if not within the B. N. A. Act, neither the affirmance of the power by the Local Legislature nor the legislative recognition of it by the Dominion Parliament could confer it.

Is such legislation as this with respect to the contract of Insurance beyond the power of Local Legislation? The B. N. A. Act recognizes in the Dominion Constitution and in the Provincial Constitutions, a legislative sovereignty, if that is a proper expression to use, as independent and as exclusive in the one as in the other, over the matters respectively confided to them; and the power of each must be equally respected by the other, or *ultra vires* legislation will necessarily be the result.

It is contended that the Local Legislature not only cannot incorporate a local insurance company, but cannot pass any Act in reference to insurance, inasmuch as, it is contended, such legislation belongs exclusively to the Dominion Parliament, under the power given that Parliament to legislate in relation to "the regulation of trade and commerce."

As to the incorporation of insurance companies, this point is not

directly, though it is perhaps indirectly, involved in the questions raised in these cases. It may be remarked that, in the enumeration of the powers of Parliament, the only express reference to the power of incorporation is under § 15, "Incorporation of Banks," though it cannot be doubted that, under its general power of legislation, it has the power to incorporate companies with Dominion objects. But it is said that insurance companies are trading or commercial companies, and, therefore, within the terms "trade and commerce;" but we have matters connected with trade and commerce, such as Navigation and Shipping, Banking incorporations, Weights and Measures, and Insolvency, "and such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces," and these and the other enumerated "classes of subjects shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of the subjects by this Act assigned exclusively to the Legislatures of the Provinces."

This shows inferentially that there may be matters of a local and private nature with which the Local Legislatures may deal, and which, but for the exclusive power conferred on the Local Legislatures, might be comprised under some of the general heads set forth in Section 91, as belonging to the Dominion Parliament. This is made very apparent in respect to Navigation and Shipping.

By Section 91 the exclusive legislative authority of the Parliament of Canada is declared to extend "to all matters coming within the classes of subjects next hereinafter enumerated," of which "Navigation and Shipping" is one. When we turn to the enumeration of the exclusive powers of the Provincial Legislatures, we find:

"Local works and undertakings, other than such as are of the following classes: (a) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province; (b) lines of steamships between the Province and any British or foreign country; (c) such works as, although wholly situate within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces."

And then follows "The Incorporation of Companies with Provincial objects."

Here then are matters immediately connected with navigation and shipping, trade and commerce.

If the power to legislate on navigation and shipping and trade and

commerce vested in the Dominion Parliament, necessarily excluded from Local Legislatures all legislation in connection with the same matters, so that nothing in relation thereto could be held to come under "local works and undertakings," or "property and civil rights," or under "all matters of a merely local or private nature in the Province," or "the Incorporation of Companies with Provincial objects," what possible necessity could there be for inserting the exception "other than such as are of the following classes" (as above—*a, b, c.*) On the contrary, does not this exception show beyond all doubt, by irresistible inference, that there are matters connected with navigation and shipping, and with trade and commerce, that the Local Legislatures may deal with, and not encroach on the general powers belonging to the Dominion Parliament for the regulation of trade and commerce, and navigation and shipping, as well as railways, canals and telegraphs. Can it be successfully contended that this is not a clear intimation that the Local Legislatures were to have, and have, power to legislate in reference to lines of steamers and other ships, railways, canals, and other works and undertakings wholly within the Province—subject, no doubt, to the general powers of Parliament over shipping and trade and commerce, and the Dominion laws enacted under such powers; as, for instance, the 31st Vic. Cap. 65 (1868), "An Act respecting the inspection of steamboats, and for the greater safety of passengers by them," or the Act 36 Vic. Cap. 128, "An Act relating to shipping."

With reference to Insurance Companies, and the business of insurance in general, it is contended these Companies are trading Companies, and therefore the business they transact is purely a matter of trade and commerce, and therefore, Local Legislatures cannot in any way legislate either in reference to Insurance Companies or Insurance business.

As to such a Company being a trading Company, Jessell, M. R., in the case of *in re Griffith* (L. R. 12, Ch. 655), did not seem to think the question so abundantly clear as is supposed; he says:—"I come now to the next point, which is, what is this Company? Is it a trading or other public Company?"

So that we have it, that it must be a public Company, whether it is a trading or other Company; therefore it seems immaterial to consider whether a particular Company is or is not a trading Company, and I am glad of it, because, though I think an Insurance Company might be called a trading Company, many people might take the opposite view of the word "trade." I take the larger view, and think it would be called a trading Company, but it is immaterial. If it is a public

Company at all, and not a trading Company, it comes under the term "other public Company."

I am willing to assume that Insurance Companies may be considered trading Companies, and yet it by no means follows that the legislation complained of is beyond the powers of the Local Legislatures.

With reference to section 91, and the classes of subjects therein enumerated, Lord Selborne, *L'Union St. Jacques de Montreal and Belisle* (L. R. 6 P. C. 36), says:—

"Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may properly be described as general legislation."

No one can dispute the general power of Parliament to legislate as to "trade and commerce," and that where Local legislation over matters with which Local Legislatures have power to deal, conflicts with an Act passed by the Dominion Parliament in the exercise of any of the general powers confided to it, the legislation of the Local, must yield to the supremacy of the Dominion Parliament; in other words, that the Provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion Parliament may prescribe.

I adhere to what I said in *Valin v. Langlois* (3 Can. Supreme c. 1)—that, while the property and civil rights referred to were not *all* property and *all* civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, and the power of the Local Legislatures was to be subject to the general and special legislative powers of the Dominion Parliament—and to what I there added (p. 15): "But while the legislative rights of the Local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the Local Legislatures; and, therefore, the Dominion Parliament would only have the right to interfere with property or civil rights so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada."

The power of the Dominion Parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with that of the Local Legislatures, to regulate property and civil rights in respect

to all matters of a merely local and private nature ; such as matters connected with the enjoyment and preservation of property in the Province, or matters of contract between parties in relation to their property or dealings. Although the exercise by the Local Legislatures of such powers may be said remotely to affect matters connected with trade and commerce—unless indeed the laws of the Provincial Legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce,—I do not think the Local Legislatures are to be deprived of all power to deal with property and civil rights, because Parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the Local Legislatures of their powers ; the exercise of the powers of the Local Legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.

The Act, now under consideration, is not, in my opinion, a regulation of trade and commerce ; it deals with the contract of fire insurance, as between the insurer and the insured. That contract, is simply a contract of indemnity against loss or damage by fire, whereby, one party, in consideration of an immediate fixed payment, undertakes to pay or make good to the other, any loss or damage by fire, which may happen during a fixed period to specified property, not exceeding the sum named as the limit of insurance.....

But by the Act now assailed, I do not understand that any supreme sovereign legislative power to regulate and control the business of insurance in Ontario is claimed. The Act deals only with this contract of indemnity ; it does not profess to deal with trade or commerce, or to make any regulation in reference thereto. It is simply an exercise of the power of the Local Legislature for the protection of property in Ontario, by securing a reasonable and just contract in favor of parties insuring property, real or personal, in Ontario, and deals therefore only with a matter of a local and private nature,—in order to protect parties from being imposed upon by the insertion of conditions and stipulations in such a way as not to be brought to the immediate notice of the insured.

As the case of *Smith v. Commercial Union Insurance Company* (33 U. C., Q. B., 69) shows, that the judicial tribunals found that legislative protection was required in Ontario against unreasonable and unjust conditions imposed on the assured by the assurers, so, should experience show, that over-insurance were of frequent occurrence, and led to fraudulent burning,—whereby not only fraud was encouraged, but the

neighboring properties of innocent parties wholly unconnected with the insurance were jeopardized—could it be said that it would be *ultra vires* for the Legislature of a Province, with a view to stop such practices, to enact that in every case of over-insurance, whether intentional or unintentional, the policy should be void, or to make any other provisions in reference to the contract of insurance, as to value, as would in the opinion of the Local Legislature, prevent frauds and protect property? Could such legislation be held to be *ultra vires*, as being an interference with trade and commerce, because it dealt with the subject of insurance; or, for preventing frauds and perjuries, would it be *ultra vires* for the Local Legislature to enact, that, as to all contracts of insurance entered into in Ontario, no insurance on any building or property in Ontario should be binding, or valid, in law or equity, unless in writing.

If the legislative power of the Provincial Legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case is carried to its legitimate logical conclusion, the idea of the power of the Local Legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the Province, is, to a very great extent, illusory.

I scarcely know how one could better illustrate the exercise of the power of the Local Legislatures to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby, is granted a right to hold or deal with real or personal property in a Province, and the civil right to contract, and to sue and to be sued as an individual in reference thereto; and, if a Legislature possesses this power, as a necessary sequence, it must have the right, to limit and control the manner in which the property may be so dealt with, and, as to the contracts in reference thereto, the terms and conditions on which they may be entered into—whether they may be verbal, or shall be in writing or whether they shall contain conditions for the protection or security of one or other or both the parties—or to declare that the contracting parties may be free to deal, as may be agreed on by them, without limit or restriction.

Inasmuch, then, as this Act relates to property in Ontario, and the subject matter dealt with, is therefore local; and as the contract between the parties is of a strictly private nature; and as the matters thus dealt with, therefore, in the words of the British North America Act, are “of a merely local or private nature in the Province”; and as contracts are

matters of civil rights, and breaches thereof are civil wrongs ; and as only the property and civil rights in the Province are dealt with by the Act ; and as “ property and civil rights in the Province ” are in the enumeration of the “ exclusive powers of Provincial Legislatures ; ” I am of opinion that the Legislature of Ontario, in dealing with these matters in the Act in question, did not exceed their legislative powers.

In *Paul v. Virginia* (8 Wall. U. S., S. C., 168), Held :

That a State Statute compelling a foreign Insurance Company to take out a license and make a deposit of bonds with the State Treasurer according to the amount of its capital, preliminary to transacting business in the State, is not in conflict with the clause of the Constitution of the United States which declares that Congress shall have power to “ regulate commerce ” with foreign nations and among the several States.

That Corporations are not citizens within the meaning of the clause which declares that “ the citizen of each State shall be entitled to all the privileges and immunities of citizens in the several States,” and that corporations created in one State have not even an absolute right of recognition in other States, but depend for the enforcement of their contracts upon the assent of those States.

Mr. Justice Field, in delivering the Judgment of the Court, said :

The Corporation being the mere creation of local law, can have no legal existence beyond the limits of the Sovereignty where created. As said by this Court in *Bank of Augusta v. Earle*, “ It must dwell in the place of its creation, and cannot migrate to another sovereignty.” The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States. Having no absolute right of recognition in other States, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose.

They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

In *Ducat v. Chicago* (10 Wall. U. S., S. C., 415), Held :

That a license granted by a State to a foreign Insurance Company,

on condition of the Company paying a tax of two per cent. on its premiums or gross receipts, was not in conflict with the Constitution of the United States.

Mr. Justice Nelson, in delivering the opinion of the Court, said : "The power of the State to discriminate between her own domestic corporations and those of other States desirous of transacting business within her jurisdiction is clearly established ; as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." (Following the decision in *Paul v. Virginia*, 8 Wall. U. S., S. C., 168.)

In *Railroad Company v. Maryland* (21 Wall. 456), Held :

That a stipulation in the charter of a Railroad Company, that the Company shall pay to the State a portion of its earnings, is not repugnant to the United States Constitution, it being, a contract by the Company, and different in principle from the imposition of a tax on the movement or transportation of goods or persons from one State to another.

In *Howe Machine Co. v. Walker* (35 U. C., Q. B., 39), Held :

That a foreign corporation has a right to make contracts and carry on business in the Province of Ontario.

(Richards, C. J., in delivering the Judgment of the Court, gave an elaborate review of the English and United States authorities.)

In *Allison v. Robinson* (3 Pugs. 103), the Supreme Court of New Brunswick held :

That a business transaction of a foreign Insurance Company was illegal and void, on the ground that it violated the Provincial Act (19 Vic. c. 45), which prohibits any foreign Insurance Company from doing business in the Province without first filing a certificate giving certain information, required by the Statute, as to their business affairs.

Chaudière Gold Mining Company & Desbarats et al. (17 L. C. J. 275), Held :

That by the laws of the Province of Quebec all corporations are disqualified from acquiring Real Property without first obtaining the Royal or Legislative permission.

In *Beard v. Steele* (34 U. C., Q. B., 55), Held :

That the Ontario Statute, 33 Vict. c. 19, amending the law relating to bills of lading, and declaring the rights and liabilities of parties

under those instruments of traffic, was not an invasion of the jurisdiction of the Federal Parliament, which alone has the power to regulate trade and commerce.

In *Attorney General v. The Niagara Falls Bridge Co.* (20 Gr. Ch. 35), Held :

That the Provincial Attorney General, and not the Attorney General of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown, but relates to a violation of the rights of the public of Ontario, even if those rights are created by an Act of the Dominion Parliament.

That in the case of a public nuisance caused by an illegal obstruction of a railway, the Provincial Attorney General is the proper officer to prosecute in a Court of law.

In *Kirtland v. Hotchkiss* (100 U. S., S. C. 491), Held :

That the U. S. Constitution does not prohibit a State from taxing a resident citizen for debts held by him against a non-resident, evidenced by his bonds, payment whereof is secured by deeds of trust or mortgages upon real estate in another State.

The debt, although a species of intangible property, if not for all other purposes, may for the purposes of taxation be regarded as situated at the domicile of the creditor.

In *Taylor v. Porter et al.* (4 Hill 140), Held :

That the Legislature of the State of New York has no power to take private property for private uses. It has no power to take the property of A. and give it to B. either with or without making compensation.

The People v. Supervisors of Westchester (4 Barb. 64), Held :

That vested rights in property acquired by virtue of an Act of the Legislature of the State of New York, cannot be divested or destroyed by such Legislature, by a repeal or modification of the Act.

In *The Lottawanna* (21 Wall. 558), Held :

That the Congress of the United States, under the power to regulate commerce, has authority to establish a lien on vessels of the United States uniform throughout the whole country, in favor of persons furnishing supplies to vessels, but that the States, until Congress acts, may continue to legislate on the subject, though the contract to furnish the supplies, is a maritime contract, which can only be enforced by proceedings *in rem* in the District Courts of the United States.

In *Church and Middlemiss* (21 L. C. J. 319), S. C., Montreal, it was held :

That the members of the Executive Council are not personally liable in warranty, to a purchaser, for having advised the execution of a deed of sale by the Crown of certain real property which the Crown had no right to transfer. In theory of law, the judgment and decision upon every matter of State, is that of the Sovereign, though every minister is directly responsible to Parliament for his conduct in office, and for the advice he tenders to his Sovereign.

In *Normand and La Compagnie de Navigation du St. Laurent*, Held by the Q. B. on 7th March, 1879, reversing decision of the Superior Court, 4 Q. L. R., noted *ante* p. 143 :

That the Provincial Governments have the right to grant letters patent for the use of riparian lots, provided that the use of such lots does not interfere with the navigation of the river, which is controlled by the Dominion authorities exclusively.

The text of the judgment is as follows :

Considering that among the powers conferred on the Governments of the several Provinces, by sect. 92 of B. N. A. Act, 1867, is that of administering and selling the public lands belonging to the Province, and that this right includes that of selling and disposing of the riparian lots of land which form part of the territorial domain of the Provinces ;

And Considering that the Government of the Province of Quebec has not exceeded its powers in granting to the appellant (Normand) the letters patent of the 1st September, 1873, and that there is error in the judgment rendered by the Superior Court at Three Rivers on the 16th February, 1878, which annulled and set aside the said letters patent ;

But Considering that the said letters patent conferred no right of a nature to diminish the advantages of using the River St. Maurice for the ends of navigation, the control of which navigation belongs to the Dominion Government exclusively ;

And Considering that the appellant has no right to claim an indemnity from the Company respondent for the wintering of their vessels in that part of the River St. Maurice comprised in said letters patent ;

Considering, moreover, that the said letters patent could not be set aside on the issue raised ; that the appellant has not proved having suffered damages from the acts of the respondents, and that there is

no error in that part of the judgment appealed from, the Court, reforming the said judgment, quashes and annuls that part of the said judgment which sets aside the said letters patent, and confirms the judgment as to the remainder.

In *Pound v. Turck* (95 U. S., S. C., 793), where it was held that in the absence of Federal legislation bearing on the case, a Statute of a State which authorizes the erection of a dam across a navigable river, which is wholly within her limits, is not unconstitutional, Mr. Justice Miller, in delivering the opinion of the Court, said :

The principle established by the decisions to which we have referred, is, that in regard to the powers conferred by the Commerce clause of the Constitution, there are some, which from their essential nature are exclusive in Congress, and which the States can exercise under no circumstances, while there are others, which from their nature may be exercised by the States until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

In *Langlois v. Valin* (3 Can. S. C., p. 1), it was held by the Supreme Court of Canada :

That the exclusive power of legislation given to Provincial Legislatures by sub-sec. 14 of sec. 92 B. N. A. Act over procedure in civil matters, means procedure in civil matters within the powers of the Provincial Legislatures, and does not extend to the regulation of the procedure in controverted elections or bankruptcy, which belongs to the Federal Parliament.

In *Re Niagara Election case* (29 U. C., Q. B., 279), Gwynne, J., in delivering judgment, said :

"These words (*procedure in civil matters in those Courts*) plainly apply, as it appears to me, to the procedure in those civil matters over which the preceding paragraph (the 13th) gave to the Provincial Legislature exclusive control, namely, 'property and civil rights in the Province,' and do not affect the procedure in the case before us, which, being a matter over which the Provincial Legislature has no jurisdiction, it could not assume to prescribe a procedure relating thereto."

In *The Queen v. Coote*, L. R. 4, P. C. 599 (1872), their Lordships, sustaining, in this respect, the Court of Queen's Bench for the Province of Quebec :

Held, that the constitution of the Court of the Fire Marshal, by the Quebec Statutes, 31 Vict. c. 31 and 32 Vict. c. 29, with the powers given to it, was within the competency of the Provincial Legislature.

In *ex parte Duncan* (16 L. C. J. 190), Dunkin, J., held :

That the Pedlar clauses of the Quebec License Act (34 Vict. ch. 21) taking away the right of *certiorari*, do not conflict with the British North America Act of 1867, which assigns to the Parliament of Canada the exclusive right of legislation in reference to all matters coming within the criminal law, including the procedure in criminal matters.

In *Peak v. Shields, Common Pleas, Ontario* (16 Can. Law. J. 212), held :

That the acts referred to in sec. 136 of the Insolvent Act, are not by that section constituted crimes, punishable as such under that and the following sections.

That the right of the Provincial Legislature to direct the civil procedure in, the Provincial Courts has reference to the procedure over which the Legislature has power to give those Courts jurisdiction, and does not in any way interfere with or restrict the right or power of the Parliament of Canada to direct the procedure to be adopted in cases over which Parliament has jurisdiction.

In *re Centre Wellington Election* (44 U. C., Q. B., 132), held (by a unanimous Court).

That the Court of Queen's Bench, Ont., has no jurisdiction to issue a *mandamus* to the Junior Judge of the County of Wellington to proceed with the recount of votes (under 14 Vic. c. 6, sec. 14) at an election of a member for the House of Commons of Canada ; that the right to deal with all such matters belongs to the House of Commons, except so far only as the Parliament of Canada has expressly devolved on the Courts certain express duties and powers respecting elections ; and this proposed interposition by *mandamus* is not one of those so devolved. The House of Commons retains all powers that it has not expressly given up.

In *ex parte James Smith et al. & Hempstead* (16 L. C. J. 140 ; S. C., 1872), Held :

That under the Act of the Dominion Legislature, 31 Vic. cap. 76,

the Superior Court is authorized to order the attendance of a witness to be examined under a *commission rogatoire* issued out of a Foreign Court.

Torrance, J., said: "This is a matter of international comity, and the Act is one which the Dominion Parliament might very properly pass. Matters of international comity are more under its control than under the control of the Legislature of Quebec."

§ 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

Poitras and The Corporation of the City of Quebec, held by Superior Court, Quebec, (Caron, J. (9 R. L. 531):

That the Quebec Legislature, with a view of executing its own laws, has no authority to order imprisonment at hard labor, its power being limited to inflict punishment by fine, penalty or imprisonment only, and not by hard labor.

This was a writ of prohibition ordering the Corporation of Quebec to abstain from executing a conviction of the Recorder, condemning the petitioner to pay a fine of \$40 and costs, and in default of payment to be imprisoned during three months at hard labor, for having kept his tavern open upon a Sunday. The conviction was set aside on the ground above mentioned. But the Court went further—one of the reasons given, being in the following terms: "Considering that the Quebec Legislature has not the power either to prohibit or limit the sale of intoxicating liquors, in any manner whatever, but is only authorized to impose licenses, for the purpose of raising a revenue for Provincial or municipal objects, the Court grants the demand of the petitioner.

The reporter, in a note, mentions a case of Collopy and the same Corporation, where the same views have been expressed in a judgment by Justices Stuart and McCord, but not formally recorded, the case being still pending.

Regina v. Boardman (30 U. C., Q. B. 553). The Ontario Legislature passed an Act, 32 V. c. 32, declaring (s. 39), "that any person, who, having violated any of the provisions of this Act, shall compromise, compound or settle, &c., &c., the offence, with the view of preventing a complaint or conviction, shall be guilty of an offence under this Act, and be imprisoned *at hard labor* in the common gaol of the county for three months. The defendant being convicted of com-

pounding such an offence, and sentenced to three months imprisonment in the common gaol, was brought up by *Habeas Corpus*, and his discharge was moved, on the ground that the Local Legislature of Ontario had no power to enact such a provision, which amounted to creating an offence punishable as above, a subject exclusively assigned to the Dominion Parliament. The following cases were cited in support of the demand of discharge: *Lucas and McGlashan*, 29 U. C., Q. B., 81; *Buitt v. Conant*, 1 B. & B., 574; *Regina v. Mason*, 17 U. C., C. P., 534; *Meyers & Wonnacott*, 23, U. C., Q. B., 611. It does not appear that the condemnation coupled imprisonment with *hard labor*.

Held, that the Legislature of Ontario had power, under ss. 15 of s. 92 to, enact that any person, who, having violated any of the provisions of the Act (32 V. c. 32), should compromise the offence, and any person who should be a party to such compromise should on conviction be imprisoned in the common gaol for three months, and that such enactment was not opposed to sec. 91, ss. 27, by which the Criminal Law is assigned exclusively to the Dominion Parliament.

Richards, C. J., delivered the judgment:—

There seems no reasonable doubt that under sec. 92, ss. 9 and 16, the Local Legislature not only had power but the exclusive right to legislate in relation to shop, tavern, auctioneer, and other licenses, in order to raise a revenue. It seems equally clear that they had the right to impose punishment by fine, penalty, or imprisonment for enforcing any law properly passed by them on matters within their exclusive jurisdiction. . . . We think we must come to the conclusion that when the Imperial Parliament used the words "The Criminal Law," and "including the procedure in criminal matters," they did not mean that the Local Legislature had not the power to legislate so as to punish by fine or imprisonment with the view of enforcing the laws, where such power is expressly given by that Act.

If the Local Legislature were to pass a law forbidding the compounding or settling of the offence by any person who had been guilty of a violation of Local Statutes, and declaring the same to be a misdemeanor for which the party could be indicted and punished by fine and imprisonment, that might with more propriety be considered as passing a criminal law and regulating the procedure in it. But in this case it seems not an unreasonable mode of ensuring the proper enforcement of the primary object of the law—the preventing of parties from exercising the calling of shop, saloon or tavern keeper, without obtaining and paying for the proper license for that purpose.

In *ex parte Papin*, for *Habeas Corpus* (15 L. C. J., 334), held by Drummond, J.:

That the powers conferred by a local Act of the Province of Quebec (32 Vict. c. 70, sec. 18) on the Corporation of Montreal, for cumulative punishments, are unconstitutional. The punishment imposed by Local Legislatures under section 92, ss. 15, must be either fine, penalty or imprisonment; it cannot be fine and imprisonment. Same decision, by Torrance, J., on *Certiorari ex parte Papin* (16 L. C. J., 319).

In *Regina v. Black* (43 U. C., Q. B., 180), Held:

That where defendant was convicted of selling liquor in violation of the License Act (37 Vict. ch. 32 and 40 Vict. ch. 18, Ont.), and a penalty of \$40 imposed in pursuance of its provisions, declaring that either fine or imprisonment may be imposed, there is no power to impose hard labor for non-payment of the fine, as the Act only authorized the alternative of fine or imprisonment as a punishment for the offence. The decision in the case of *Regina v. Boardman*, which apparently affirms the power of Provincial Legislatures to authorize imprisonment at hard labor, questioned.

In *Paige v. Griffith* (18 L. C. J. 119), Held:

That the power conferred on the Legislature of Quebec by the B. N. A. Act of 1867, of imposing "fine, penalty or imprisonment," does not restrict the power of the Provincial Legislature to the exercise of only one of those modes of punishment at a time. The word "or" is not necessarily to be taken in a disjunctive sense; it may be taken in a connective sense. Sanborn, J., said, he did not think it was intended to give power to the Provincial Legislatures to exercise only one of those modes of punishment at a time, and that he could not agree with the holding of Justices Drummond and Torrance in *ex parte Papin*. It must have been intended to apply each mode of punishment according to the gravity of the offence, and to use both, or all, when required.

In *Paige & Griffith* (17 L. C. J., 302, Q.B., Crown side of Quebec, 1873), Sanborn, J., held:

That the Provincial Legislature had power to provide the procedure for enforcing the penalties incurred under the License Act 34 Vic., c. 2. That the British North America Act gives the Legislatures of the several Provinces power over shop, saloon and tavern licenses, and to impose fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated among their powers. Where power is

given by Statute to impose a penalty, it implies power to enforce it. (Dwarris on Statutes, p. 23.)

In *Pope & Griffith*, 16 L. C. J., 169 (Q. Bench, discharging the functions of the Court of Quarter Sessions). The Legislature of the Province of Quebec having by the Quebec License Act attached a fine, penalty or imprisonment to the sale or keeping of spirituous liquors without a license, and having prescribed the conditions necessary to be complied with, before an Appeal can be allowed from a conviction for a violation of the provisions of the Act, Ramsay J., held :

That the provisions of the Provincial Act prescribing a criminal procedure on Appeal from such conviction are not beyond the powers of the Provincial Legislature.

That sub-section 16 of section 92 reserves to the Local Legislature generally the right to make laws affecting all matters of a merely local or private nature in the Province. It is not a question of clashing, the powers of the Local Legislature and of the Dominion Parliament are perfectly distinct. Each of the Legislatures makes the laws of procedure affecting the criminal laws which they enact respectively.

§ 16. Generally all Matters of a merely local or private Nature in the Province.

See *ante*, cases under sub-sections 13, 14, 15 and 16.

The peculiar institutions of each Province are preserved from Federal interference by this Section.

On the 2nd Reading of the B. N. A. Bill in the House of Lords (19th February, 1867), the Earl of Carnarvon said :

A Legislative Union, is, under existing circumstances impracticable. The Maritime Provinces are ill-disposed to surrender their separate life, and to merge their individuality in the political organization of the general body. It is in their case, impossible, even if it were desirable, by a stroke of the pen to bring about a complete assimilation of their institutions to those of their neighbors.

Lower Canada, too, is jealous, as she is deservedly proud, of her ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding that she retains them.

The 42nd Article of the Treaty of Capitulation in 1760, when Canada was ceded by the Marquis de Vaudreuil to General Amherst, runs thus :

Les Français et Canadiens continueront d'être gouvernés suivant la Coutume de Paris et les lois et usages établis pour ce pays.

The *Coutume de Paris* is still the accepted basis of their Civil Code, and their national institutions have been alike respected by their fellow-subjects and cherished by themselves. And it is with these feelings and on these terms that Lower Canada now consents to enter this Confederation.

Education.

Legislation respecting Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

§ 1. Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

§ 2. All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects, shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

§ 3. Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union, or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

§ 4. In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of CANADA may make remedial Laws for the due Execution of the Provisions of this Section,

and of any Decision of the Governor General in Council under this Section.

Ex parte Renaud et al. (1 Paga. 273 ; 3 R. C. 117.)

The litigation in this case arose upon petition to set aside an assessment, on the ground that the New Brunswick Legislature had no power to enact the Common Schools Act of 1871, under which the assessment was levied.

The Legislature of the Province of New Brunswick, in 1871, passed the Act entitled "The Common Schools Act, 1871," which repealed the School Act of 1858 (21 Vic. c. 9), entitled an "Act relating to Parish Schools," under which the Common School system of the Province of New Brunswick was carried on at the time of Confederation.

It was contended on the part of the petitioner that the Common Schools Act of 1871 by repealing the School Act of 1858, and enacting that all Schools conducted under the Act of 1871 shall be non-sectarian thereby deprived Roman Catholics not only of the right which the Act of 1858 had secured to them, of having the Douay Bible read by their children in the mixed schools, but also of the privilege which they had under that Act, of creating schools of a character exclusively Roman, Catholic in districts where the population was entirely Roman Catholic.

Also, that the Board of Education under the Act of 1871 promulgated a Regulation, that "Symbols or emblems distinctive of any national or other society, political party or religious organization, shall not be exhibited or employed in the school room, either in its general arrangement or exercises, or on the person of any teacher or pupil." And therefore, that the Common Schools Act of 1871 does "prejudicially affect" rights and privileges which were secured to Roman Catholics as a class in respect to Denominational Schools, and is therefore unconstitutional, as being in conflict with ss. 1 of sec. 93 of B. N. A. Act.

And also that the omission in the Common Schools Act of 1871 to secure to all children—whose parents do not object—the reading of the Bible ; and that when read by Roman Catholic children, if required by their parents, it shall be the Douay version without note or comment, prejudicially affects rights and privileges under ss. 1 of sec. 93, B. N. A. Act.

It was held by the Court :

That, neither the School Act of 1871, nor the School Act of 1858,

which it repealed, provided for the establishment of Denominational Schools, and that neither of those Acts conferred any legal rights or privileges upon any class of persons or upon any one Denomination of Christians, in the government or control of the schools organized thereunder; and that the schools established in pursuance of the Act of 1858 were not Denominational, and therefore that the School Act of 1871, which declares that the schools conducted under *its* provisions shall be non-denominational, is not *ultra vires* of the Legislature of New Brunswick as prejudicially affecting any legal right or privilege with respect to Denominational Schools which any class of persons had at the Union, or as being in conflict with any of the provisions of sect. 93 of the B. N. A. Act of 1867.

That if the right does exist of creating schools of a character exclusively Roman Catholic, and of using religious or national emblems in the exercises of the school, or upon the person of the teacher or pupil, and of having their own translation of the Bible read in mixed schools by the children of Roman Catholic parents, that this right is not taken away by any provisions of the Act of 1871, as it may still exist, if it is a right which legitimately comes under sec. 93 of the B. N. A. Act; for, if such a right did exist under the School Act of 1858, it would then become the duty of the Board of Education, under the Common Schools Act of 1871, to secure, by regulation, just what the Board of Education were bound to secure under the School Act of 1858.

That if this right did exist under the School Act of 1858, and was protected by the B. N. A. Act of 1867, and the Board of Education neglected to secure this right by proper regulations, or if any improper regulations were made under their authority, this could not affect the constitutionality of the Common Schools Act of 1871, although it might then be a case coming within sec. 4 of sect. 93, providing for remedial legislation by the Parliament of Canada.

In delivering the judgment of the Court, Chief Justice Ritchie said :

The Regulations are not before us in such a way that we can deal with them, and we are not called upon to express any decided opinion as to their validity, because the constitutionality of the School Act of 1871 cannot in our opinion be affected by any regulations made under it—there being nothing unconstitutional in the Act itself.

As in this case there was no legal right under the School Act of 1858 to have Denominational schools or teachings, there is no injury in legal contemplation committed by the Legislature dealing with the

question in such a manner as to prevent that possibility from arising; and consequently there is no right to have the action of the Legislature abrogated.

The inability of a class of persons to have under the Common Schools Act, 1871, that which, possibly they might under certain exceptional and accidental circumstances have had, under the School Act of 1858, but which, they had no right to insist on having, is a damage not occasioned by anything which the law esteems an injury—it is a kind of damage termed in law *damnum absque injuria*, and for which there is no remedy.

See, Todd on Parliamentary Government in Col. (pp. 346-352) and Dominion Sessional Papers of 1877, No. 89, for a history of the controversy on the questions involved in this case, and of the action of the Dominion Government in reference thereto.

Discussion in the Imperial Parliament on this section.

On the 19th February, 1867, when the B. N. A. Bill was under discussion in the House of Lords, the Earl of Carnarvon expressed himself on the question of Education as follows:—

Lastly, in the 93rd clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that that great question gave rise to nearly as much earnestness and division of opinion, on that, as on this side of the Atlantic. This clause has been framed after long and anxious controversy, in which all parties have been represented, and on conditions, to which all have given their consent. It is an understanding, which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if, in the opinion of Parliament, it were susceptible of amendment; but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one Province the same rights, privileges and protection which the religious minority of another Province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of Lower Canada, and the Roman Catholic minority of the Maritime Provinces, will thus stand on a footing of entire equality. But, in the event of any wrong at the hand of the local majority, the minority have a right to appeal to the Governor General in Council, and may claim the application of any remedial laws that may be necessary from the Central Parliament of the Confederation.

On the 22nd of February, 1867, the Earl of Shaftesbury presented to the House of Lords, petitions, from the Governors, Principal, and Fellows of the McGill College, Montreal, from the Provincial Association of Protestant Teachers of Lower Canada and others, directing attention to several provisions of the Bill, and especially to the 93rd clause, which, in their operation they feared would have the effect of subjecting them to the will of those possessing the majority of the representation, and they desired the introduction of a clause for their security.

The Earl of Carnarvon in answering these petitions, while showing that the fear expressed had been attended to by the 80th clause, which provided that no change should be made in the districts which returned the Protestant minority without the consent of the members returned by those districts, stated :

To introduce the clause asked for, would violate one of the principles upon which the Bill was based—namely, that the Local Legislatures should have the power of amending their own Constitutions.

. . . He could only say further that if he were to accept an amendment based on the petitions, it would be difficult to resist other amendments of an analogous character put forward by opposing interests. In fact, only a few minutes before he entered the House, that day, he had received a paper setting forth the views of a strong and very respectable Roman Catholic minority, who feared that the 93rd clause would not extend to them the protection which they conceived to be their due. His answer to them, as to his noble friend, must be, that to comply with their wishes would be to depart from a compact entered into by the representatives of all shades of religious and political opinions. If the compromise were departed from in favor of one party, it must inevitably be departed from in favor of another.

In Board of School Trustees v. Grainger et al. (25 Gr. Ch. 579), Held :

That Local Legislatures may legislate as to separate schools provided that the legislation is not such as prejudicially affects the rights or privileges theretofore possessed by such schools, and may pass laws interfering with the position or mode of election, of trustees of separate schools as settled by Statute prior to Confederation.

Blake, V. C., in delivering the Judgment of the Court, said :

I cannot attach any weight to the argument that, under the words, "an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority" (sub-section 4), the persons interested in separate schools have the right to present such a difficulty as the present, to the Governor General in Council ; the meaning to be attributed to the word "decision" is explained by the words

which surround it. The word "Act" which precedes the word "decision," and the words "of any Provincial authority," which follow it, shew that the matters contemplated as those which should be presented to the supreme authority are such as are Acts, or their equivalents and not the every-day detail of the working of a school.

Regina v. College of Physicians and Surgeons (44 U. C., Q. B., 564), held by a unanimous Court :

That a medical practitioner registered in England under the Medical Act (21 and 22 Vict. c. 90, and 31 Vict. c. 29) which provides that every person so registered should be entitled to practice Medicine and Surgery "in any part of Her Majesty's Dominions," is entitled without examination to practice in the Province of Ontario on payment of the proper fees.

That the Imperial Parliament can legislate for the Provinces notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject.

That the exclusive right of legislation upon education granted by the B. N. A. Act to the Provincial Legislatures means exclusive as opposed to any attempt to legislate by the Dominion Parliament.

A Bill to incorporate the Christian Brothers as a Company of Teachers for the Dominion, which was presented to the Federal Parliament in 1876, was preferred by the Senate to the Supreme Court of Canada. It was reported by the Supreme Court to be unconstitutional and *ultra vires* of the Federal Parliament as infringing upon the powers of the Provincial Legislatures, in whom by this section is vested the exclusive control over education.

(Senate Journal of 1876, p. 155.)

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of CANADA may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of CANADA to make Laws in relation to any Matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted ; but any Act of the Parliament of CANADA making Provision for such Uniformity shall not have effect in any Province unless

Legislation for uniformity of Laws in Three Provinces.

and until it is adopted and enacted as Law by the Legislature thereof.

In *Perley et al. v. Burpee* (Sunbury Election Petition, Supreme Court of N. B., not yet reported.), Duff, J. remarked:

By collating section 92, sub-section 13, with section 94, we will be afforded another illustration of the manner in which passages seemingly irreconcilable at first sight, will be found perfectly consistent on a closer examination. By the former, the exclusive authority to legislate on the subjects of "Property and Civil Rights in the Province" is given to the Provincial Legislatures. By the latter, the Parliament of Canada is authorized to make provision for the uniformity of the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick. Such legislation, however, would manifestly conflict with the power given to the Provincial Legislatures by sub-section 13, were it not that section 94 provides that no law making provision for such uniformity shall go into effect, in any Province, until it is adopted and enacted as a law by the Legislature thereof. Therefore, it was, that in the Petition of Right Act (38 Vic. cap. 12) it was expressly provided that none of the Provincial Courts should have cognizance of any matter under that Act, "unless the Legislature of the Province of which the same is a court shall have empowered the said court to administer the rights by this Act conferred in accordance with the procedure herein defined."

Agriculture and Immigration.

Concurrent
Powers of
Legislation
respecting
Agriculture,
&c.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of CANADA may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of CANADA.

See *ante* Sect. 91, p. 114.

VII.—JUDICATURE.

Appointment
of Judges.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province,

except those of the Courts of Probate in Nova Scotia and New Brunswick.

Kent in his Commentaries (vol. 1, p. 453) quotes as follows from the decision of the U. S. Supr. Court in *Marbury v. Madison* (1 Cranch 177) as finally settling the question as to the competency of the Courts to pass upon the constitutionality of the Acts of the State Legislatures:—

The powers of the Legislature are defined and limited by a written Constitution. But to what purpose is that limitation, if these limits may at any time be passed? The distinction between a Government with limited and unlimited powers, is abolished, if those limitations do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation; if the Constitution does not control any legislative Act repugnant to it, then the Legislature may alter the Constitution by an ordinary Act. The theory of every Government with a written Constitution, forming the fundamental and paramount Law of the nation, must be, that an Act of the Legislature repugnant to the Constitution, is void; if void, it cannot bind the Courts, and oblige them to give it effect; for, this would be to overthrow, in fact, what was established, in theory, and to make that operative in law which is not law.

It is the province and the duty of the Judicial Department to say what the law is, and, if two laws conflict with each other to decide on the operation of each; so, if the law be in opposition to the Constitution, and both apply to a particular case, the Court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law. If the Constitution be superior to an Act of the Legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the Constitution, and see only the law?

In *Re Bedard* (13 Jur. p. 1, p. 641), held by their Lordships of the Privy Council:

That the Crown can by Letters Patent give to one Judge precedence over other Judges in the Court of Queen's Bench, Montreal.

Although a majority of the Judges of the Court of Queen's Bench for the District of Montreal were of opinion, that the rank of a Judge being an incident of his office, it was not in the power of the Crown to deprive him of that.

— The Ontario Acts 32 Vict. c. 22 respecting County Courts, and 32 Vict. c. 1 (passed in 1869), as far as it affects the salary of the Judges of the Superior Courts providing for the tenure of office, increase of salary, and removal of

the County Judges, were disallowed by the Governor acting upon the opinion of the Law Officers of the Crown. They considered these Acts inconsistent with the provisions of sections 92 and 96 of the B. N. A. Act, and *ultra vires* of the Provincial Legislature.

(Dom. Sess. Pap. 1877, No. 89, p. 204.)

Selection of
Judges in
Ontario, &c.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of
Judges in
Quebec.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of Office
of Judges of
Superior Courts

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

Salaries, &c., of
Judges.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of CANADA.

General Court
of Appeal, &c.

101. The Parliament of CANADA may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for CANADA, and for the Establishment of any additional Courts for the better Administration of the Laws of CANADA.

Acting under the provisions of this section, the Dominion Parliament passed the 38 Vic. c. 2 (1875), an Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada, and the 39 Vict. c. 26, an Act to make further provision in regard to these two Courts, and also the amending Act 42, V. c. 39.

Previous to the passing of these Acts, the same Parliament had passed the 34 and 35 Vict. c. 10, an Act intituled: "An Act to make better provision for the trial of controverted elections of Members of the House of Commons, and respecting matters connected therewith;" the effect of which was to trans-

for the trial of such controverted elections, from the special committees of the House, to the Superior Courts of law existing in the several Provinces, from which Courts, an Appeal was granted to the Supreme Court, by sect. 45 of the Supreme Court Act, 35 Vict. c. 2.

The constitutionality of that Act has been fully sustained by the Supreme Court of Canada in *Fulda v. Langlois* (3 Can. S. C. 13).

Ritchie, C. J., in the course of his judgment in that case, remarked :

That in England, before 1770, controverted elections were tried and determined by the whole House of Commons, or, for a time, by special Committees. . . . This was succeeded by the Grenville Act, the principle of which was, to select by lot, Committees for the trial of Election Petitions. This Act in 1773 was made perpetual. . . . In 1839, an Act was passed (Sir Robert Peel's Act) establishing a new system upon different principles, and it was not till 1868, after Confederation, that the jurisdiction of the House of Commons in the trial of controverted elections was transferred by statute to the Courts of law.

In *Théberge v. Landry* (46 L. J. Rep., P. C., p. 1—25 W. R. 216—L. R. 2 App. Cas. P. C. 102),

Held by their Lordships of the Privy Council that the Act of the Dominion Parliament entitled "*The Quebec Controverted Elections Act, 1875*," having vested the decision of controverted elections for the office of members of the Legislative Assembly of that Province in the Superior Court, and section 90 having enacted "that such judgment shall not be susceptible of Appeal," the Act excluded the Prerogative right of Appeal to the Crown—having been assented to, on the part of the Crown.

Lord Cairns, C., in delivering the judgment of their Lordships, said :—

That while the Prerogative of the Crown once established cannot be taken away except by express words, that this does not preclude their Lordships from considering whether it was ever intended by the Imperial Parliament, in the scheme of their legislation, to create a tribunal which should have as one of its incidents, the liability to be reviewed by the Crown under its Prerogative In the opinion of their Lordships, advertng to these considerations, the 90th section, which says that the judgment shall not be susceptible of Appeal, is an enactment which indicates clearly the intention of the Legislature under this Act—an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party—to create this tribunal for the purpose of trying election petitions in a manner which should

make its decisions final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. The 89th Section of the Act of 1875 provides that the Superior Court sitting in review shall determine, first, whether the member whose election or return is complained of has been duly elected or declared elected; second, whether any other person, and who, has been duly elected; third, whether the election was void; and fourth, all other matters arising out of the petition, or requiring its determination. Then the 90th section enacts "such judgment shall not be susceptible of Appeal." These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character.

They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new and up to that time unknown jurisdiction in a particular Court of the Colony, for the purpose of taking out (with its own consent) of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction, which, up to that time had existed in the Legislative Assembly, of deciding election petitions, and determining the *status* of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction, must be, that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

As to the rights and the privileges of the electors, and of the Legislative Assembly to which they elect members, those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly in complete independence of the Crown.

In *Vulin v. Langlois*, (5 Q. L. R. p. 1—3 L. N. 38), Meredith, C. J., held:

That, the Dominion Controverted Elections Act, 1874, is not *ultra vires* of the Dominion Parliament.

That, the Dominion Parliament may assign the duty of the trial of an Election Petition to any subjects of the Dominion, whether they be officials of Provincial Courts or other officials or private citizens.

That, although it may be true that the Dominion Parliament cannot extend the jurisdiction of any Provincial Court, it does not

follow, and is not true, that the Dominion Parliament cannot legally assign to judges of the Provincial Courts any judicial duties that can be discharged by such judges out of Court, consistently with their duties as judges of the Provincial Courts.

That, as, under section 101 of the B. N. A. Act, of 1867, "the Parliament of Canada may, notwithstanding anything in this Act, from time to time provide, &c., for the establishment of any additional Courts for the better administration of the laws of Canada." And, as, under sections 13 and 48 of the Dominion Controverted Elections Act of 1874 a trial Court is established by the Dominion Parliament for the trial of Election Petitions, and this trial Court made a Court of Record, the Court of Record so established, must be held, to be a *Dominion* Court, separate and distinct from any *Provincial* Court. That, as the election trial does not take place before a *Provincial* Court, but before a *Dominion* Court, the Dominion Parliament has the legal right to declare what shall be the civil procedure in the matter. The provisions of the B. N. A. Act of 1867, giving the Provincial Legislature exclusive powers to make laws respecting the "procedure in civil matters" in *Provincial* Courts, may, from the nature of the subject, be understood as meaning "civil matters," *within the power of those Legislatures*; and not as giving to the Provincial Legislatures power to establish the procedure, in civil matters utterly beyond their power and completely under the control of the Dominion Parliament.

On Appeal to the Supreme Court of Canada the judgment of Mr. Chief Justice Meredith was affirmed (3 Can. S. C., p. 1—2 L. N. 364—15 Can. L. J., N. S., 311), the Court holding :

That the Dominion Parliament, has not, in enacting the Dominion Controverted Elections Act, 1874, exceeded the express power conferred upon them to provide for the trial of Controverted Elections.

That the Dominion Parliament has a perfect right to delegate to the Judges of the several Provinces individually or collectively, or both (in any way not being inconsistent or in conflict with their duties as Judges of their respective Courts) the power to determine Controverted Elections.

That the Dominion Parliament has the right to interfere with civil rights, when necessary for the purpose of legislating in relation to matters confided to them.

That the exclusive power of legislation given to Provincial Legislatures by sub-sections 13 and 14 of sec. 92, means, the power of

legislating for the administration of Justice in regard to the subjects confided to such Legislatures by the B. N. A. Act, and to that extent only, including the procedure necessary for the Administration of Justice, in reference to those subjects.

Ritchie, C. J., Henry, J., Gwynne, J., and Taschereau, J., also held :

That the Dominion Parliament has the right either to create new Courts or to use the Provincial tribunals already established for the administration of its laws.

Chief Justice Ritchie, in delivering judgment, said :

It is, I think, to section 91, in reference to the legislative authority of the Parliament of Canada, and to sections 18 and 41, conferring privileges on the Senate and House of Commons and legislative power over the trial of Controverted Elections and proceedings incident thereto, that we must look, to ascertain whether the Parliament of the Dominion, in enacting the 37 Vict. c. 10, exceeded its powers. The establishment of additional Courts for the better administration of the laws of Canada was primarily intended to apply, when deemed necessary and expedient, rather to the general laws of the Dominion than to matters connected with the privileges, immunities and powers of the Senate and House of Commons, though, of course those might incidentally, if so provided, come within the jurisdiction of such tribunals. [In this case special leave to appeal from this judgment to the Privy Council was refused, their Lordships having no doubt of the soundness of the decision, and holding that section 41 of the B. N. A. Act, reserved to the Parliament of Canada the power of creating a jurisdiction for the trial of Election Petitions, and that the Parliament of Canada has power to commit such jurisdiction to existing Provincial Courts. L. R. 5, App. Cases, P. C., p. 115.]

These two cases, *Théberge & Landry*, and *Valin & Langlois*,—*Sustain*

Bruneau & Massue, 23 L. C. J. 60 ; 2 L. N. 38.

Dubuc & Vallée, 5 Q. L. R. 34.—*And Overrule*

Bélanger & Caron, 5 Q. L. R. 19.

Guay & Blanchet, 5 Q. L. R. 43.

Deslauriers & Larue, 5 Q. L. R. 191.

Petition of Right Act.

The Dominion Parliament also passed The Petition of Right Act, 1875 (38 V. c. 12), which was repealed and replaced by The Petition of Right Act, 1876 (39 V. c. 27).

Cassels, in the Introduction to his "Manual of Procedure in the Supreme and Exchequer Courts of Canada" (page 42), says :

In England where a right was sought to be established against the Crown, the course prescribed by the Common Law was to address a Petition to the King in one of his Courts of Record, praying that the conflicting claims of the Crown and the petitioner might be examined.

As the prayer of this petition was grantable *ex debito justitiæ*—probably it came within Magna Charta, *nulli vendemus, nulli negabimus aut differemus justitiam vel rectum*—it was called a petition of Right. (See *ante* “Actions against Representatives of the Crown” p. 42.)

Appeals.

In *The Grand Trunk R'y Co. and The Credit Valley Railway Co. and The Northern Railway Co.*, Held by H. E. Taschereau, J., Supreme Court of Canada:

That sect. 6 of 42 V. Can., ch. 39, which reads as follows: “An Appeal shall lie to the Supreme Court, by leave of the said last mentioned Court or a Judge thereof, from any decree, decretal order, or order made or pronounced by a Superior Court of Equity, or made or pronounced by any Equity Judge, or by any Superior Court, in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity, and from the final judgment of any Superior Court of any Province, other than the Province of Quebec, in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court, without any intermediate Appeal being had to any intermediate Court of Appeal in the Province,” is *ultra vires* of the Dominion Parliament.

H. E. Taschereau, J., in rendering judgment, said:

On the 7th January, 1880, the Court of Chancery, at Toronto, ordered an injunction to issue against the Credit Valley Railway Co., restraining them from taking possession of a portion of the 100 feet strip between Queen street and the Diamond crossing, to which the Credit Valley Railway Co. claimed a right under the authority of a license of occupation, granted to them in July, 1879, by the Minister of the Interior.

An application was made by the Credit Valley Railway Co., under sect. 6 of the Act 42 V. Can., c. 39, for leave to Appeal from the said judgment to the Supreme Court of Canada, without any intermediate Appeal being had to the Ontario Court of Appeal. The Grand Trunk Railway Co. opposed the application, on the ground *inter alia*, that the said section 6, is *ultra vires* of the Dominion Parliament. I am with the plaintiffs, in this contention. I am of opinion, that under sect. 101 of the B. N. A. Act, 1867, the Federal authority has power

to grant an Appeal from the Provincial Courts of last resort only. A different construction would interfere to such an extent with the power over the administration of justice in the Province, which is so exclusively given to such Province, that I cannot adopt it. The judicial hierarchy and the degrees of jurisdiction in the Provinces would be entirely under Federal control, if such a wide construction, as the one contended for here by the defendants, were admitted.

If the Dominion Parliament had the right to enact this clause, it has the right to order that all Appeals, say, for instance, from the Ontario Superior Courts, shall be brought directly to the Supreme Court, and thus virtually to abolish the Ontario Court of Appeal. To contend that the Dominion Parliament has the power to grant or authorize the granting of an Appeal from the Court of original jurisdiction, without an Appeal being had to the Provincial Court of Appeal, is to contend that a Provincial Statute on the administration of justice, and the constitution, maintenance and organization of a Provincial Court of Appeal, can be repealed by the Federal legislative authority. For instance, in this case, if, in the Ontario Court of Appeal, the judgment of the Court of Chancery were reversed, the Grand Trunk Railway Co., under ch. 13, sect. 57 and 58, of the C. S. for Upper Canada (ch. 38, s. 49 of the R. S. O.), would have an appeal to the Privy Council. Now, the Dominion Parliament has deprived them of that right, or has assumed the power to authorize me to deprive them of it. Had I the right to do so, I would hesitate and pause before giving such an order. But I do not think that the Dominion Parliament has such a power.

Reference has been made to sect. 27 of the Supreme Court Act, under which the parties can, by consent, appeal directly to the Superior Court from the Court of original jurisdiction. I always thought that this clause was impliedly repealed by the Statute of 1880, sect. 5 and 6. However, whether it is or not, I do not hesitate to say that this clause 27 is unconstitutional. The consent of the parties does not make any difference, and cannot give jurisdiction where it does not exist. Of course, under sect. 101 of the B. N. A. Act, which grants to the Dominion Parliament the power to establish a general Court of Appeal, *notwithstanding anything in the Act*, that Parliament, must have the right to interfere more or less with what should otherwise be comprised within the administration of Justice in the Provinces. But in my opinion such a construction must be put upon this clause of the Constitutional Act as must the least interfere with the exercise of the powers so expressly given to the Provincial Legislatures in the other parts of the Act. By the interpretation I give to this clause 101, the

Federal Parliament has the right to create a Court of Appeal from the Courts of last resort in each Province. In this way the words of this clause and each of them have their effect; whilst by giving to the Dominion Parliament the right to interfere with the degrees of jurisdiction of the established Courts of the Provinces, the administration of justice in the Province, and the constitution, maintenance and organization of Provincial Courts are left to the Provinces, as the British North America Act enacts that they should be left. I hold therefore that section 6 of 42 V. Can. c. 39, is unconstitutional, and the application is refused.

The Judicial Committee of the Privy Council.

The Sovereign, by virtue of the Royal Prerogative alone, has the right and authority to revise the decisions of the Colonial Courts and grant leave to Appeal. (1 Bl. Com. 108 and 109, Chalm. Opinions 490, Cowp. 169.)

The Parliament of Canada was empowered by this section to provide for the maintenance and organization of a General Court of Appeal for Canada, and in the Act (38 Vic. c. 2) constituting and organizing the Supreme Court of Canada, the Dominion Parliament sought to constitute such Court of last resort and of final Appeal, and it was provided by section 47 of that Act, that the judgment of the Supreme Court shall in all cases be final and conclusive, and no Appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which Appeals or Petitions to Her Majesty in Council may be ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.

Duff, J., in *Dow v. Black* (3 Pugs. 439), remarked, that:

As the fountain of justice, but not as a court of justice, an Appeal has always lain to the Sovereign from the Colonial Courts; a privilege which the colonists have never been slow to avail themselves of. And this, like almost every other prerogative right exercised by the Sovereign in person, in modern times, has been exercised under the advice of the Privy Council. As the Colonial Empire extended and increased in population and in wealth, and came to embrace, as it did, a great variety of systems of jurisprudence, Appeals not only multiplied, but they assumed such a character as to require for their decision great learning and special legal attainments. To provide additional facilities for disposing of the increased amount of business, and to secure, as advisers of the Sovereign in the disposal of it, the services of men so

eminent alike in personal character, in learning and in legal acquirements, as to command the confidence and respect of the various races and peoples composing the Colonial Empire of Great Britain, the aid of Parliament was invoked; and by the 3 & 4 W. 4 c. 41, the Judicial Committee of the Privy Council was established.

By 34 and 35 Vict. c. 91, 1871, entitled An Act to make further provision for the despatch of business by the Judicial Committee of the Privy Council, it was enacted:

That Her Majesty might, "by warrant, under Her Sign Manual, appoint four additional persons to act as members of the Judicial Committee of the Privy Council," who must be specially qualified as follows, that is to say, must at the date of their appointment be, or have been judges of one of Her Majesty's Superior Courts at Westminster, or a Chief Justice of the High Court of Judicature at Fort William, in Bengal, or Madras, or Bombay, or of the late Supreme Court of Judicature at Fort William, in Bengal,—to act as members of the Judicial Committee; the Judges so appointed to hold office during good behaviour, and notwithstanding the demise of the Crown (though removable upon the joint action of both Houses of Parliament), and each to be paid a salary of £5,000 a year.

By the "Supreme Court of Judicature Act, 1873," (36 and 37 Vict. c. 66) provision was made by the Imperial Parliament for the transfer by Her Majesty, by an Order in Council, to the Court created by that Act, of the Jurisdiction of the Judicial Committee of the Privy Council.

In *Johnston v. Minister and Trustees of St. Andrew's Church, Montreal* (L. R. 3 App. P. C. 159; 26 W. R. 359; 1 L. N. 13), their Lordships held:

That Her Majesty's prerogative to allow an Appeal if so advised to do, is left untouched by section 47 of the Canada Act (38 Vict. c. 11), establishing the Supreme Court of the Dominion. The Lord Chancellor, who delivered the judgment of their Lordships, said:

As to that part of section 47 of the Supreme Court Act which reads, "No Appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which Appeals or Petitions to Her Majesty in Council may be ordered to be heard," these words refer to what may be called the hypothetical establishment of a Court, by the Parliament of Great Britain and Ireland, by which Court, Appeals from the Colonies are supposed to be ordered to be heard, and, inasmuch as, no Court of that kind has been established, that part of the section may be omitted from our consideration.

It is enacted by 31 Vict. Imp. c. 1, s. 7, ss. 33, that "no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Her heirs or successors, unless it be expressly stated that Her Majesty shall be bound thereby." See *in re Henley & Co.* (26 W. R. 885; 39 L. T. N. S. 53), noted under sec. 91, ss. 21—p. 181.

In the case of *Lawless and Sullivan* [noted *ante* at p. 225] special leave to appeal from a judgment of the Supreme Court of Canada was granted by the Privy Council in November 1879.

In *Théberge et al. v. Landry* (L. R. 2 P. C. 102), which was a case of a controverted election, it was held by their Lordships:

That the Act of the Dominion Parliament taking away in express terms, the right of Appeal from the Judgment of the Superior Court for the Province of Quebec, was a legitimate exercise of the powers of the Dominion Parliament; that the Imperial Act constituting the Dominion Parliament (being assented to on the part of the Crown) excluded the Prerogative right of Appeal to the Crown in matters of controverted elections.

In the matter of the *Petition of Thomas K. Ramsay* (L. R. 3 P. C. 427—7 Moore's P. C., N. S., 273) for leave to Appeal from the Court of Q. B., Lower Canada, to the Privy Council from an order of a Judge inflicting upon him a fine of \$40 for alleged Contempt of Court, no appearance having been entered on the part of the Judge, their Lordships intimated that the right of Appeal was doubtful, but that the matter might come before them on a reference from the Crown, when it would necessarily be considered without regard to the question of the right of Appeal. This was accomplished upon the recommendation of the Colonial Secretary.

Their Lordships were thus relieved from considering the question of the right of Appeal by the withdrawal of the petition for special leave to Appeal and the substitution of a petition, which, after detailing the circumstances of the case, prayed Her Majesty to refer the same to Her Judicial Committee for hearing under the Provisions of the 3rd and 4th Will. 4, c. 41, s. 4. By an Order in Council the petition was so referred. On the merits of the case it was, —

Held, by their Lordships that a Judge of the Court of Queen's Bench (Lower Canada), whilst sitting alone in the exercise of the Criminal jurisdiction conferred upon the Judges of that Court by the 77th ch. of the Con. Stat. of L. C., had no authority to issue a rule calling upon the petitioner to show cause why he should not be punished for an alleged Contempt of Court in publishing letters reflecting on the conduct of the Judge whilst acting as a Judge of the Court of Q. B., under

95th c. of Con. Stat. of L. C. Such proceedings could only legally and properly be taken before the full Court of Q. B.

Herbert v. Purchas (L. R. 3 P. C. 664).

— A petition addressed to the Queen in Council for the re-hearing of an Appeal, decided—but decision not yet reported to Her Majesty,—by the Judicial Committee of the Privy Council, must be referred by Her Majesty to their Lordships of the Judicial Committee by a special Order in Council in accordance with the provisions of 3 and 4 Will. 4 c. 41, sec. 4, in order to give the Judicial Committee jurisdiction to consider and report upon the prayer of the petition.

In *Cuvillier v. Aylwin* (2 Knapp's P. C. 72—Stuart's Rep. 527), Held :

That the Sovereign has no power to deprive the subject of any of his rights ; but that the Sovereign acting with the other branches of the Legislature has the power of depriving any of his subjects in any of the Countries under his dominion of any of his rights, and among other rights, of the right of Appeal to the Sovereign in Council.

In *Cushing v. Dupuy* (42 L. T., N. S., 445) :

An application to the Court of Queen's Bench for the Province of Quebec for leave to Appeal to Her Majesty in Council was refused, on the ground that under the provisions of the Insolvency Act its judgment was final.

On a petition presented by the appellant to Her Majesty in Council for special leave to Appeal, their Lordships decided that the Judges below were right in holding that they had no power to grant leave to Appeal, for the Parliament of Canada had the power to exclude the right of Appeal to the Crown, and intended so to do by the enactment of the Insolvency Act. But that the Insolvency Act contains no words which purport to derogate from the Prerogative of the Queen to allow, as an act of grace, Appeals from the Court of Queen's Bench in matters of Insolvency, and their Lordships consequently decided that the Order for leave to Appeal, granted in the case, should stand.

The case of *Cuvillier v. Aylwin* (2 Knapp P. C. 72)—in which an application for special leave to Appeal was refused—commented on, and qualified, and the principle that the right of the Crown to grant leave to Appeal can only be taken away by express words, re-affirmed. But the decision in *Cuvillier v. Aylwin*, that the right of the subject to Appeal to the Crown may be taken away by Parliament, was not disapproved.

In *George v. The Queen* (L. R. 1 P. C. 390),

Leave to Appeal, *in forma pauperis*, from a decree of the Vice-

Admiralty Court of Sierra Leone was given, by the Judicial Committee, notwithstanding the usual security for costs had not been given, and leave to Appeal had been refused in the Court below.

In *Credit Foncier of England v. Elec. Amy* (L. R. 6 P. C. p. 146),

An Appeal was allowed by the Privy Council from an order of the Royal Court of Jersey confirming and registering a composition deed between a bank and its creditors, although it was provided by the Jersey Act of 1867, that the decision of the Royal Court in such cases should be final.

Webster v. Power (L. R. 1 P. C. 150) :

After the confirmation of a decree by the Superior Court of Victoria in its appellate jurisdiction, leave to Appeal to the Privy Council was granted, but the Supreme Court subsequently made an order revoking the leave given; their Lordships thereupon, upon petition, gave special leave to Appeal.

In *Riney v. The Trustees of Sierra Leone* (8 Moore's P. C. 47), the Judicial Committee held :

That they have no jurisdiction to entertain an appeal from orders made by a Court of Record imposing fines for Contempt of Court; that the orders made by the Court in the exercise of its discretion, imposing these fines for contempt, are conclusive, and cannot be questioned by another Court, and there is no remedy by petition to the Judicial Committee to review the propriety of such orders.

But upon a reference by Her Majesty to the Judicial Committee (the appellant having presented a petition to Her Majesty through the Colonial office), the Judicial Committee advised the Crown to remit part of the fines, which, by an Order in Council, was directed.

Ex parte Robertson (1 Moore's P. C. 288), Held by their Lordships :

That the Judicial Committee have no jurisdiction (unless the matter is expressly referred to them by the Crown) to take into consideration the propriety of the dismissal of a public servant by a Governor-General of a Colony from an office created by the Act of a Colonial Legislature, and held during his pleasure.

Such an office is not a patent office within the meaning of the Imperial Statute 22 Geo. 3, c. 75, and consequently does not come within the provisions of that Statute allowing an Appeal to Her Majesty in Council by any person aggrieved in cases of amotion from such offices.

In *The Falkland Islands Company v. The Queen* (1 Moore's P. C., N. S., 299), held by their Lordships :

That the Queen has authority by virtue of Her Prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal character—unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature, is so great, and the obstruction it would offer to the administration of justice in the Colonies is so obvious, that the Judicial Committee are very reluctant to admit an application for such an Appeal.

Ex parte Eduljee Byramjee (11 Jur., part 1, p. 885),

The Charter of Bombay granted by the Crown under the authority of an Act of Parliament constituted the Supreme Court a Court of Oyer and Terminer and jail delivery, to administer criminal justice, with power to allow or refuse permission to appeal in criminal cases; held:

That the Crown where acting under the authority of Parliament may part with any portion of its Prerogative, and that the Crown had *pro tanto* delegated the power to allow or refuse permission to Appeal.

In *Lambkin v. The South Eastern Railway Co.* (21 L. C. J. 325),

The Court of Queen's Bench, Montreal, rejected plaintiff's motion for leave to Appeal to Her Majesty in Council from a judgment setting aside the verdict of a jury, and ordering, on defendant's motion, a new trial in a cause in which the verdict of the jury had awarded plaintiff \$7,000 damages.

The Court of Q. B. holding that a judgment setting aside the verdict of a jury, and ordering a new trial, was an interlocutory judgment, from which no Appeal is allowed.

A motion for special leave to Appeal was then made directly to the Privy Council:

Their Lordships, held, that the Appeal ought to be allowed; that a judgment setting aside the verdict of a jury and ordering a new trial does not belong to the class of interlocutory judgments from which no Appeal was allowed; but was, as regards the right of Appeal, a judgment of last resort.

Their Lordships said: "If the verdict of a jury be sustained on Appeal, the defendant has a right to resort to a higher Court of Appeal—and the plaintiff is entitled to have the same recourse, if his verdict be set aside."

Sauvageau and Gauthier (L. R., 5 P. C., 494,—22 W. R. 667.)

Under the Code of Civil Procedure for Lower Canada, the appeal-

able amount is £500 sterling, but an appeal is also permitted in cases of less value if they be “cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected.”

An annual rent \$11.28c. had been sold for \$456, payable in ten equal yearly instalments, and the land was hypothecated to secure the amount. In a suit to enforce payment of certain instalments, the Court of Queen's Bench for Lower Canada granted leave to Appeal to Her Majesty in Council :

Held by their Lordships, that the case did not fall within this provision of the Code of Procedure, and that the Court of Q. B. had no power to allow the Appeal.

Sir James W. Colville, in pronouncing the judgment of their Lordship, said : “ Their Lordships have not the means of knowing whether the title to those other *choses* in action would stand upon precisely the same ground as the title to that in question in this suit. Some of them may have been realized, and as to some of them, notice may have been given long before the insolvency. Their Lordships cannot assume that the facts touching these other debts were before the Judges in Canada ; and even if they were, their Lordships, considering the mode in which this litigation arose, are not satisfied that it was a case in which the Court of Queen's Bench would have had jurisdiction to allow an Appeal. Their Lordships . . . leave it for the consideration of the appellant, whether he would prefer now to have the appeal dismissed without costs, or whether he would wish the case to stand over, in order that he may present a petition for special leave to appeal, upon such grounds as he thinks might induce their Lordships to recommend Her Majesty to give that leave.

In *Trimbee v. Hill* (28 W. R. 479),

Held, by their Lordships of the Privy Council, That when a Colonial Act is in the same terms as an Imperial Act, the Colonial Courts ought to govern themselves by the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination is arrived at by the House of Lords.

In *Stanton v. The Home Insurance Co.* (2 L. N. 314),—Q. B., Province of Quebec.

Sir A. A. Dorion, C. J., said : This is an application on the part of the appellant to be permitted to Appeal to the Privy Council. The action was for \$2,150, a sum less than £500 sterling, but the case has been pending eight years, and the interest and principal united

amounts to considerably more than £500 sterling. In the case of *Voyer & Richer*, the Privy Council allowed an Appeal (though this Court had refused it), on the ground that, by adding interest and costs, the amount in dispute was over £500 sterling. That was contrary to the whole course of decisions in this country, and the decisions in this country were in conformity to the Statute. (C. S. L. C. cap. 77, s. 25.)

Ramsay, J., said : The Privy Council had powers which this Court had not, and the Privy Council was not bound by our Statute. Until the law was changed, this Court must refuse the Appeal in such cases, subject to the right of the party to make special application to the Privy Council.

Abbott v. Macdonald (In Review ; Montreal), (21 L. C. J., p. 311),

Johnson, J., who delivered the judgment of the Court, said : That notwithstanding the prohibition of the Provincial Act 37 Victoria, c. 6, enacting that the party inscribing for a review shall have no Appeal to the Queen's Bench if the judgment inscribed against, is confirmed, the subsequent legislation of the Federal Parliament (38 Victoria c. 11) constituting a Supreme Court, and defining its jurisdiction under powers specially conferred by the British North America Act, 1867, gave by its 17th section, an Appeal to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original Jurisdiction.

In *The Colonial Bank of Australasia v. Willan* (22 W. R. 516 ; Privy Council), Held :

That the Supreme Court of the Colony of Victoria has a general power to issue a writ of *Certiorari* to any inferior Court in the Colony co-extensive with the like power of the Court of Queen's Bench in England, unless the power to issue a *Certiorari* to these Courts has been taken away by Statute.

In *The Queen v. Laliberté* (1 Can. S. C. 117),

Held, on Appeal from the Court of Queen's Bench for the Province of Quebec, that the Supreme Court has no authority to grant a new trial in any criminal case tried in that Province ; for section 38 of the Supreme and Exchequer Court Act directs that this Court shall, in the alternative of a reversal, give the judgment which the Court below ought to have given, and since the repeal of section 63, ch. 77 of the Consolidated Statutes of Lower Canada, the Court of Queen's Bench could not have granted a new trial.

Section 49 of the Supreme Court Act, which authorizes the Supreme

Court to grant a new trial, must be read in such a way as to make it consistent with section 38.

In *The City of Montreal and Devlin* (22 L. C. J. 136), Held :

That leave to Appeal to the Privy Council from a judgment of the Court of Queen's Bench will be granted, although the opposite party has already obtained leave to Appeal to the Supreme Court of Canada.

In *Richer v. Voyer* (L. R., 5 P. C., 462) :

On appeal from the Court of Q. B. for Lower Canada, Sir Montague E. Smith, in delivering the judgment of their Lordships, said, in reference to notes which had been obtained by the respondents from one of the Judges of the Court of Queen's Bench, purporting to be the reasons for his judgment, that the reasons given by the Judge for his judgment ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal. The Rule requires the reasons given by the Judges to be communicated to the Registrar. It is obvious, that the omission to send them to the Registrar, as required by the Rule, and allowing only one of the parties to have them, was calculated to give that party an undue advantage.

In the present case, their Lordships felt constrained to refuse to look at notes, so irregularly communicated.

Lord Carnarvon, Secretary of State for the Colonies, on the 28th November, 1874, transmitted a circular despatch to the Governor General of Canada, of which the following is a copy :

Sir,—The Administrator of a Colonial Government has recently forwarded to me a Petition to the Queen in Council, from one of the parties in a private suit, for leave to appeal to Her Majesty in Council from a judgment of the Supreme Court of the Colony.

2.—I take this opportunity to inform you that it is no part of the duty of the Governor of a Colony to forward such Petitions, but that they should be brought before the Lords of the Judicial Committee of the Privy Council by a professional agent of the petitioner, in the usual manner.

3.—I have further to inform you, that it is not the practice of the Judicial Committee to return any answer to such Petitions until an appearance has been entered on behalf of the petitioner.

4.—If, therefore, application should be made to you by a party in a private suit to transmit a Petition of this nature to the Secretary of State, you will decline to do so ; and you will inform the petitioner

what are the proper steps to be taken in the matter. (39. Vict. Can. p. lxxiii).

An attempt on the part of the Dominion Government to bring before the consideration of the Judicial Committee of the Privy Council questions relating to the constitutionality of the Common Schools Act, passed in 1871 by the Provincial Legislature of New Brunswick, proved unavailing, for the reasons stated in a letter from the Privy Council office, as follows :

Sir,—I have submitted to the Lord President of the Council your letter of the 9th inst., transmitting a copy of a despatch from the Governor General of Canada with enclosures, respecting an Act passed by the Provincial Legislature of New Brunswick with reference to Common Schools, and requesting to know whether the opinion of the Lords of the Judicial Committee of the Privy Council on this question can properly be obtained.

It appears to His Lordship that as the power of confirming or disallowing Provincial Acts is vested by the Statute in the Governor General of the Dominion of Canada, acting under the advice of his constitutional advisers, there is nothing in this case which gives to Her Majesty in Council any jurisdiction over this question ; though it is conceivable that the effect and validity of this Act may at some future time be brought before Her Majesty on an appeal from the Canadian Courts of Justice.

This being the fact, His Lordship is of opinion that Her Majesty cannot, with propriety, be advised to refer to a Committee of Council in England a question which Her Majesty in Council has at present no authority to determine, and on which the opinion of the Privy Council would not be binding on the parties in the Dominion of Canada.

(Dom. Sess. Papers, 1877, No. 89, p. 407.)

By 40 Vict. c. 21 (1877) the Dominion Parliament created a Court of Maritime Jurisdiction extending to the inland waters of the Province of Ontario, and granting the remedies afforded by any British Court of Vice Admiralty, as if the process of the latter Court extended to the said Province.

In *Insurance Company v. Morse* (20 Wall. 245), Held :

That an agreement in all cases to abstain from resorting to the Courts of the United States is void as against public policy, and that a State Statute requiring such an agreement is in conflict with the Constitution of the United States, securing to citizens of another State the absolute right to remove their cases into the Federal Court.

This decision re-affirmed in *Doyle v. Continental Insurance Co.* (94 U. S., S. C., 535) upon the principle that every man is entitled

to resort to all the Courts of the country to invoke the protection which all the laws and all the Courts may afford him, and that he cannot barter away his life, his freedom, or his Constitutional rights.

In *Murray v. Charleston* (96 U. S., S. C., 432), Held :

That wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by State legislation which is sustained by the judgment of a State Court, the U. S. Supreme Court is authorized to interfere.

Its jurisdiction, therefore, to re-examine such judgment cannot be defeated by showing that the record does not in direct terms refer to some constitutional provision, nor expressly state that a Federal question was presented. The true jurisdictional test is, whether it appears that such a question was decided adversely to the Federal right.

VIII.—*Revenues ; Debts ; Assets ; Taxation.*

102.—All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union, had and have power of Appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the Public Service of CANADA in the Manner and subject to the Charges in this Act provided.

Creation of
Consolidated
Revenue Fund.

The Earl of Carnarvon on the 2nd Reading of the B. N. A. Bill in the House of Lords on the 19th February, 1867, in stating the understanding of the separate Provinces as to this part of the compact, said :

Clauses 102 to 126 regulate the conditions, pecuniary and commercial, upon which the Provinces enter into Union. They are so entirely matter of local detail and agreement, that I need not weary the House with any minute statement of them. It is enough to say, that under them a Consolidated Fund is created, and that whilst lands and minerals are reserved to the several Provinces, the assets, property, debts and liabilities of each, will be transferred to the Central body.

By this agreement, the public creditor who exchanges the security of each separate Province for the joint security of the four Provinces confederated, will find his position improved rather than deteriorated.

As between the Provinces, it is proposed that the Local Legislatures should surrender to the Central Parliament all powers of raising

revenue except by direct taxation; in return for this concession, the Central Government will remit to the Local Legislatures certain fixed sums and a proportionate capitation payment, in order to enable them more conveniently to defray the costs of local administration.

The debt of each Province has been fixed at a certain sum calculated; but if, in the interval between the present time and the Proclamation of Union, that debt should be increased, the Province so exceeding, will pay interest on the excess, and that interest, will be deducted from the quota which they would otherwise receive from the Central authority.

Expenses of
Collection, &c.

103. The Consolidated Revenue Fund of CANADA shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of Pro-
vincial Public
debts.

104. The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, shall form the Second Charge on the Consolidated Revenue Fund of CANADA.

Salary of Gov-
ernor General.

105. Unless altered by the Parliament of CANADA, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.

On 22nd May, 1868, an Act was passed by the Senate and House of Commons of Canada reducing the salary of the Governor General from £10,000 (at which rate it had been fixed by this section) to £6,500; but the Act having been reserved for the sanction or disallowance of Her Majesty, on 30th July, 1868, the Secretary of State for the Colonies notified the Governor General, as follows:

While it was with reluctance, and only on serious occasions, that the Queen's Government can advise Her Majesty to withhold the royal sanction from a bill which has passed two branches of the Canadian Parliament, yet a regard for the interests of Canada, and a well-founded apprehension that a reduction in the salary of the Governor would place the office, as far as salary is a standard of recognition, in the third

class among Colonial Governments, obliged Her Majesty's Government to advise that this Bill should not be permitted to become law. (Dom. Sess. Papers, 1869, No. 73.—Todd, Parl. Gov. in Col. 144.)

106. Subject to the several Payments by this Act charged Appropriation from time to time. on the Consolidated Revenue Fund of CANADA the same shall be appropriated by the Parliament of CANADA for the Public Service.

107. All Stocks, Cash, Banker's Balances, and Securities Transfer of Stocks, &c. for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of CANADA, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

108. The Public Works and Property of each Province, Transfer of Property in Schedule. enumerated in the Third Schedule to this Act, shall be the Property of Canada.

See *ante*, p. 120 (Sect. 91, ss. 1,) for Third Schedule.

In *Steadman v. Robertson* (2 Pugs. & Burb. p. 598), Fisher, J., in delivering the Judgment of the Court, remarked, in reference to the clause "Rivers and Lake Improvements" in the 3rd Schedule,

The 108th section enacts that "the public works and property of each Province enumerated in the Third Schedule to this Act, shall be the property of Canada." It is only the "property of each Province" that is referred to—and this could only mean the user of the rivers for the purpose of navigation, and not the property in the fish, which was generally owned by private individuals.

It is the public property of each Province, not the property of individuals therein, which is given to Canada. By reference to the first proposition for union agreed to at Quebec, there will be found "River and Lake Improvements." It has been made plural by some inadvertence in copying. Its object is obvious enough. While Canada assumed the debts of the different Provinces, she received in return the various public works that had been constructed in incurring that debt. The River St. Lawrence or St. John would be rather an extraordinary thing to call a public work, whilst the improvements on the St. John, and the St. Lawrence, as well as on the lakes, are really public works, and have been constructed with money that created the debt. Canada assumes the debt, and receives in return the public works and property that it has constructed.

The Copy of the Quebec Resolutions which accompanied the Address to Her Majesty, adopted by the 8th Provincial Parliament of Canada, asking for Confederation on that basis—reads at sect. 55, ss. 5, "River and Lake Improvements." (Can. Parl. Deb. on Confed., p., 1031.) See, also *ante* p. 121 under sect. 91, ss. 1.

In *Attorney General v. Tomline* (28 W. R. 873), the Court of Appeal (on Appeal from Chancery Div.) held :

That where land is vested in the Crown, subject to public uses, the grantee of the Crown must take it, subject to all the obligations to which the land was subject when in the hands of the Crown. The Crown holds the bed of a navigable river, or the shore of the sea between high and low water mark, subject to the right of navigation, and the grantee of the Crown can never do anything to interfere with the navigation.

And if there is land vested in the Crown which is a natural barrier against the sea, the duty and obligation of the Crown is to protect the land from the incursions of the sea ; and a grantee of the Crown can stand in no better position than the Crown itself would do, and takes the land subject to the same obligation.

Property, in
Lands, Mines,
&c.

109. All Lands, Mines, Minerals, and Royalties, belonging to the Several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Property of Escheat—*Attorney General of the Province of Quebec v. The Attorney General of the Dominion of Canada* (2 Q. L. R. 236—1876).

F. died in the Province of Quebec intestate and without heirs. Under sect. 637 of the Civil Code of Lower Canada, his estate devolved to the Crown. Shortly after his death, a curator to the vacant estate was appointed, who took possession of the property. The Attorney General of the Province of Quebec instituted an action to recover the property from the curator. The Attorney General of the Dominion, acting on behalf of the Crown, petitioned to be allowed to intervene and claim the estate. After contestation, the claim of the Attorney General of the Dominion was allowed by the Superior Court.

The case being appealed before the Q. B., Quebec; it was held, reversing the judgment of the Superior Court :—

That an escheat was one of the sources of revenue, which, as a minor prerogative of the Crown, was yielded up to the respective Provinces, now confederated into the Dominion of Canada, prior to the Union of the Provinces of Canada, Nova Scotia and New Brunswick.

That, such escheat, prior to the Union, formed part of the revenue of the respective Provinces in which they arose, and that all territorial Crown rights and prerogatives possessed by the late Provinces of Canada, Nova Scotia and New Brunswick, before the Union thereof into the Dominion of Canada, have been by the B. N. A. Act given to the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick.

That, by holding escheats to be royalties under this section, and thereby reserved to the Provinces as forming one of their special sources of revenue, sections 102 and 117 of the B. N. A. Act are reconciled.

—An Act passed by the Legislature of the Province of British Columbia, intitled, “ An Act to amend and consolidate the laws affecting Crown lands in British Columbia,” which made no reservation of lands in favor of the Indian Tribes of British Columbia, nor accorded them any rights or privileges in respect to lands or reserves or settlements, was disallowed by the Governor General as being in violation of the 40th Article of the Stipulations of the Treaty of Capitulation of 8th September, 1760. The Governor General holding that under this section the lands belonging to the several Provinces belong to them “ subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.”

(Dom. Sess. Papers, 1877, No. 89, p. 2.)

In *Wooley et al. v. The Attorney General of Victoria* (46 L. J., N. S., p. 99) held by their Lordships :

That a Colonial grant made under a Statute authorizing a conveyance in fee simple, to a purchaser of any waste land of the Crown in such Colony, did not transfer the rights of the Crown to gold which might be found in such land; and that it is settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless, by apt and precise words the intention of the Crown be expressed that it shall pass; and that this law has been introduced into the Colony of Victoria as part of the common law of England.

Held, also, that it is a recognized principle of the construction of Statutes that the prerogative rights of the Crown can be affected only by express words or necessary implication.

Attorney General v. O'Reilly (15 Can. L. J., N. S., p. 34—1879), Proudfoot, V. C., held, on demurrer :

That the doctrine of escheats applies to lands held in Ontario, and that the Attorney General of Ontario is the proper party to represent the Crown, and to appropriate the escheat to the uses of the Province.

Assets connected with Provincial Debts.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

37 Vict. Can. c. 17, sec. 2, reads as follows :—

The Governor in Council may in his discretion advance from time to time to any Province of Canada such sums as may be required for local improvements in the Province, and not exceeding in the whole the amount by which the debt of the Province for which Canada is responsible then falls short of the debt with which the Province was allowed to enter the Union—such advances to be deemed additions to the debt of the Province, with permission to the Province to repay them to Canada, on such notice, in such sums, and on such other conditions as the Dominion Government and that of the Province may agree upon ; any amount so repaid being deducted from the debt of the Province in calculating the subsidy payable to it.

Canada to be liable for Provincial Debts.

111. CANADA shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec.

112. Ontario and Quebec conjointly shall be liable to CANADA for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

In reference to Provincial debts, an Act was passed by the Parliament of Canada (36 Vict. c. 30) to re-adjust the amounts payable to and chargeable against the several Provinces of Canada by the Dominion Government, so far as they depend on the debt with which they respectively entered the Union, providing as follows :—

Section 1. In the accounts between the several Provinces of Canada and the Dominion, the amounts payable to and chargeable against the said Provinces respectively, in so far as they depend on the amount of debt with which each Province entered the Union, shall be calculated and allowed as if the sum fixed by the 112th section of the “B. N. A. Act, 1867,” were increased from \$62,500,000 dollars to the

sum of \$73,006,088 dollars and 84 cents, and as if the amounts fixed as aforesaid as respects the Provinces of Nova Scotia and New Brunswick by the “B. N. A. Act, 1867,” and as respects the Provinces of British Columbia and Manitoba by the terms and conditions on which they were admitted into the Dominion, were increased in the same proportion.

113. The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada ^{Assets of Ontario and Quebec.} shall be the Property of Ontario and Quebec conjointly.

THE FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses
 in
Aylmer, }
Montreal, } Lower Canada.
Kamouraska.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Tamiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

114. Nova Scotia shall be liable to CANADA for the ^{Debt of Nova Scotia.} Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

See 36 V. Can. c. 30 and 37 V. Can. c. 3

115. New Brunswick shall be liable to CANADA for the ^{Debt of New Brunswick.} Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with interest at the Rate of Five *per Centum per Annum* thereon.

Payment of
interest to Nova
Scotia and New
Brunswick.

116. In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly payments in advance from the Government of CANADA, Interest at Five *per Centum per Annum* on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial pub-
lic property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of CANADA to assume any Lands or Public Property required for Fortifications or for the defence of the Country.

In *Rohl v. United States* (91 U. S., S. C., 367), Held:

That the U. S. Federal Government may, upon making just compensation to the owner, appropriate private property required for Federal purposes, if such property cannot be obtained by purchase.

Grants to
Provinces.

118. The following Sums shall be paid yearly by CANADA to the several Provinces for the Support of their Governments and Legislatures:

Dollars.

Ontario.....	Eighty thousand.
Quebec.....	Seventy thousand.
Nova Scotia.....	Sixty thousand.
New Brunswick.....	Fifty thousand.

Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents *per Head* of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those Two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on CANADA, and shall be paid half-yearly in advance to each Province; but the Government

of CANADA shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

119. New Brunswick shall receive, by half-yearly Payments in advance from CANADA, for the Period of Ten Years from the Union, an additional Allowance of Sixty-three thousand Dollars *per Annum*; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five *per Centum per Annum* on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

Further Grant
to New Brunswick.

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by CANADA, shall, until the Parliament of CANADA otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

Form of
payments.

121. All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Canadian
manufactures,
&c.

Kinnear et al. v. Robinson (1 Hannay 559). Supr. Court of N. B.

Certain liquors manufactured in Ontario prior to July 1, 1867, were warehoused for exportation, and (having paid no excise duty) were exported to Portland, U. S., where they were landed and immediately exported to St. John, N.B., where they arrived after the B. N. A. Act of 1st July, 1867, came in force.

Held, That by passing through the United States they did not become foreign goods, and were entitled to be admitted free of duty into New Brunswick under the 121st section of the B. N. A. Act.

Brown v. Maryland (12 Wheat, 419), Held:

That an Act of a State Legislature requiring all importers of foreign goods, and other persons selling the same by wholesale, to take out a license is repugnant to that provision of the United States Constitution which declares that no State shall without the consent of Congress lay

any impost or duty on exports or imports except what may be absolutely necessary for executing its inspection laws.

That there is no difference between a power to impose a license tax that would amount to a prohibition of the sale of such articles, and a power to prohibit the introduction of such articles into the State; that a tax on the sale of an article imported, is a tax on the article itself.

Mr. Chief Justice Marshall in delivering the opinion of the Court said: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a Sister State.

The taxing power of the States must have some limits—if the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation—or what should restrain a State from taxing any article passing through it for the purpose of traffic?

It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. This the State has a right to do when no constitutional prohibition extends to it. So a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself in like manner as a direct duty on the article itself would be paid. This the State has no right to do because it is prohibited by the Constitution."

In *Almy v. State of California* (24 How. 169), Held:

That a Stamp duty (for revenue purposes), imposed by the Legislature of California upon bills of lading for gold or silver transported from the State, is a duty upon the export of gold and silver, and consequently repugnant to the clause of the Constitution declaring that no State shall lay any duty on imports or exports.

In *Guy v. Baltimore* (100 U. S., S. C., 221,—1880), Held:

That a Municipal Corporation could not under the authority of any State legislation discriminate against the products of other States in the exaction of wharfage fees for goods landed at its wharves, and that a State cannot, in the exercise of her taxing power, impose upon the products of another State brought within her limits for sale or use, a more onerous burden or tax than upon the like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing in or selling them.

In *Packet Company v. St. Louis* (100 U. S., S. C., 423). Held, that:

A Municipal Corporation owning improved wharves which it maintains at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the United States Constitution from charging and collecting from parties using its wharves, such reasonable fees as will fairly remunerate it for the use of the property.

In *Ward v. Maryland* (12 Wall. 418), Held :

That a Statute of Maryland, which, among other things required of persons, not permanent residents of that State, to pay a license tax before selling or offering for sale within the limits of the City of Baltimore any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in that State, was repugnant to the Constitution of the United States.

In *Machine Company v. Gage* (100 U. S., S. C., 676), Held :

That a law passed by the Legislature of the State of Tennessee imposing an annual tax of 15 dollars "upon all pedlars of sewing machines and selling by sample" is a tax upon all pedlars of sewing machines without regard to the place of growth or produce of material or manufacture, and is not in violation of the Constitution of the United States.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada. Continuance of Customs and Excise Laws.

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation. Exportation and Importation as between Two Provinces.

124.—Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues. Lumber Dues in New Brunswick.

Chapter 15 of Title 3 of the Revised Statutes of New Brunswick was repealed by the Legislature of N. B. (36 Vict. c. 16) in 1873, in pursuance of an Act passed by the Parliament of Canada (36 Vict. c. 41) to carry into effect Articles 30, 31, and 33 of the Treaty of Washington.

These Articles provided, that if these duties were repealed for the term of years mentioned in the Treaty, Her Majesty's subjects might carry in British vessels, without payment of duty, goods, wares and merchandise, from one port or place within the territory of the United States, upon the St. Lawrence the great Lakes and the Rivers connecting the same, to another port or place within the Territory of the United States, provided that, a portion of such transportation is made through the Dominion of Canada by land carriage and in bond.

By Article 31 of said Treaty, it is declared that Her Britannic Majesty further engages to urge upon the Parliament of Canada and the Legislature of New Brunswick that no export duty, or other duty, shall be levied on lumber or timber of any kind, cut on that portion of the American Territory in the State of Maine watered by the River St. John and its tributaries, and floated down that River to the Sea, when the same is shipped to the United States from the Province of New Brunswick.

The Dominion Act, 36 Vict. c. 41; provided that the Province of New Brunswick was to receive from the Dominion Government, as indemnity for the abolition of these dues, an annual subsidy of 150,000 dollars, in addition to the subsidy the said Province was then entitled to.

Exemption of
public lands,
&c.

125.—No lands or property belonging to CANADA or any Province shall be liable to Taxation.

In *McCulloch v. Maryland* (4 Wheat. 316), Held :

That a tax laid by a State Legislature upon a branch of the Bank of the United States was unconstitutional, as being a tax laid on the Bank, and consequently a tax laid on the operation of an instrument created and employed by the Federal Government to carry its powers into execution. Held also, that this principle does not extend to a tax imposed on the proprietary interest which the citizens of the State may hold in that institution.

Provincial
Consolidated
Revenue
Fund.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, had before the Union Power of Appropriation, as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX.—MISCELLANEOUS PROVISIONS.

General.

127. If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate, shall thereby vacate his Seat in such Legislative Council.

As to Legislative Councils of Provinces becoming Senators.

128. Every Member of the Senate or House of Commons of CANADA, shall, before taking his Seat therein, take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province, shall, before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of CANADA and every Member of the Legislative Council of Quebec, shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Oath of Allegiance, &c.

See *ante*, page 76, (section 28,) for *The Fifth Schedule*.

129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, and New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all Legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec,

Continuance of existing Laws, Courts, Officers, &c.

Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

In *Valin v. Langlois* (3 Can. S. C. 1), Ritchie, C. J., in delivering the judgment of the Court, said :

The effect of this section, to which the Courts owe their very existence, is evidently, to place them under the legislative power of the Federal Government as well as, it is true, under that of the Local Government, and to make them, in fact, common to both these governments for the administration of the laws adopted by them within the limits of their respective powers.

In the recent case of *Perley et al. v. Burpee* (Sunbury Election Petition), in the Supreme Court of N. B.; Duff, J., said :

The constitution and continuance of the Local Courts are secured by section 129; which enacts, that, except as otherwise provided by the Act . . . all courts of civil and criminal jurisdiction, and all legal commissions, etc., etc., existing therein, at the time of the Union shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, respectively, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered by the Parliament of Canada or by the Legislatures of the respective Provinces, according to the authority of Parliament or of that Legislature, under the Act.

The various Provincial Courts are to remain just "as if the Union had not been made." Neither the Legislature, nor any power in the Dominion, is permitted to interfere with them, unless, authority is given to it to do so, by that Act. And inasmuch as, prior to the Union, the administration of justice in the Local Courts was undoubtedly regulated by the Provincial Legislatures, the burthen is upon those who assert that Parliament possesses that power, now to show, where it is given to Parliament.

In *ex parte Cooley, jr.*, and *The Municipality of the County of Brome* (21 L. C. J. 183), Dunkin, J., held :

That the 129th section of the B. N. A. Act, 1867, maintained in

force the Provincial Temperance Act of 1864 and all laws subsisting at the Union, subject to repeal or amendment as provided by that section.

That, since Confederation, the Provincial Legislature has not constitutionally the power to repeal any of the provisions of that Act.

That the Temperance Act of 1864 is a measure for the regulation of Trade and Commerce passed by a Legislature having power to that end, and goes to prohibit a specified branch of Trade; and prohibition is an incident of regulation, and can be enacted only by a body having power to regulate.

Similar decisions by Caron, J., in *Hart & The Corporation of Missisquoi* (3 Q. L. R. 170). See *ante*, p. 123.

In *Willett v. DeGrosbois* (17 L. C. J. 294), Held:

That "The Corrupt Practices Prevention Act, 1860" (23 Vict. c. 17), applicable to the late Provinces of Quebec and Ontario, by sections 129 and 41, are still in force—there having been no incompatible legislation thereupon by the Dominion Parliament.

130. Until the Parliament of CANADA otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be Officers of CANADA, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties, as if the Union had not been made. Transfer of Officers to Canada.

131. Until the Parliament of CANADA otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act. Appointment of new Officers.

132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of CANADA or of any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries. Treaty Obligations.

As the Commercial Treaties made by the Imperial Government do not extend to their Colonies it is unnecessary to refer to any but Extradition Treaties.

The Treaties mentioned in the following table are those the operation of which have been extended to this Dominion.

AN EXTRADITION TREATY BETWEEN HER MAJESTY AND

United States	was Signed	9 August, 1842.	Ratioed	13 October, 1842.	C. S. C. Ch. 89.
French Republic	"	14 August, 1876.	"	8 April, 1876.	42 Vict. Can. IX.
Belgium	"	20 May, 1876.	"	28 June, 1876.	40 V. C. p. XXXIII.
Extended by Decla- ration	"	23 July, 1877.	"		41 V. C. p. XIV.
Germany	"	14 May, 1872.	"	11 June, 1872.	
Italy	"	5 Feb., 1873.	"	18 March, 1873.	
Austria	"	3 Dec., 1873.	"	10 March, 1874.	38 V. C. p. XXIII.
Denmark	"	31 March, 1873.	"	26 April, 1873.	
Sweden and Norway	"	26 June, 1873.	"	28 August, 1873.	38 V. Can. p. V.
Netherlands	"	19 June, 1874.	"	21 July, 1874.	38 V. C. p. XXV.
Spain	"	4 June, 1878.	"	21 Nov., 1878.	42 V. C. p. XVIII.
Republic of Switzerl'd.	"	31 March, 1874.	"	31 Dec., 1874.	38 V. C. p. XXXI.
"	"	Above prolonged to	"	22 Dec., 1880.	43 V. Can. p. XV.
" Hayti	"	7 Dec., 1874.	"	2 Sept., 1875.	39 V. Can. p. LV.
" Honduras	"	6 Jan., 1874.	"	12 Oct., 1875.	39 V. Can. p. LX.
Brazil	"	13 Nov., 1872.	"	28 August, 1873.	38 V. Can. p. XI.

The Imperial Extradition Acts of 1870 and 1873 made applicable to these treaties.

By a Decree of the Queen of Spain of the 17th November, 1852, it was decreed that:

"The requisitorial letters of foreign Judges will be complied with in all that can and ought to be done in the kingdom according to the laws, when they come through the Foreign Ministry with the customary formalities and requirements." Hertzlet's Com. Treaties, vol. 12, p. 789.

The crimes and misdemeanors enumerated in these treaties not being uniform, it will be necessary to refer to the text of the treaty with the Country from which the offender is a fugitive, for the schedule of extraditable offences.

As the United States and France are the two countries with which, from their intercourse with the Dominion, cases of extradition more frequently arise, extracts showing the extraditable offences and the procedure will be given here.

A Treaty was signed between Great Britain and the United States on the 9th August, 1842, to settle and define the boundaries between the possessions of Her Britannic Majesty in North America and the territories of the United States; for the final suppression of the African slave trade; and for the giving up of criminal fugitives from justice, in certain cases.

The tenth article of the Treaty, in reference to the surrender of fugitives from justice, reads as follows:—

"It is agreed that Her Britannic Majesty and the United States shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: provided that this shall only be done upon such evidence of

criminality, as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed : and the respective judges and other magistrates of the two Governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered ; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

The inadequacy of the extradition provisions which permitted such an abuse of the law as shown in *ex parte Lamirande* (10 L. C. J. 280 ; 39 L. T., N. S., 180, see a summary of this case in Todd's Parl. Gov. in Col. 211), who was unlawfully surrendered while a petition for his discharge on a writ of *Habeas Corpus* was pending, led the best legal minds of England to a thorough study of the subject.

The result was (1) to make provisions tending to uniformity in extradition treaties entered into by Great Britain ; (2) to extend considerably the number of extraditable offences, including several cases of misdemeanor which had never been part of such treaties ; (3) and to provide for a special procedure, under which kidnapping could no more be practised under color of law, as in the case *ex parte Lamirande*.

A general Act was accordingly passed by the Imperial Parliament on the 9th August, 1870 (The Extradition Act, 1870-33 and 34 Vic. Imp. c. 52), to be found in Can. Stat. 35 V. p. XXI., which was made immediately applicable to the treaties with France, the United States and Denmark.

After the following Preamble :

Whereas, it is expedient to amend the law relating to the surrender to foreign States of persons accused or convicted of the commission of certain crimes within the jurisdiction of such States, and to the trial of criminals surrendered by foreign States to this country :

It enacted that :

2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals :

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character ; or, if he prove . . . that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character :

(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the Extradition Crime proved by the facts on which the surrender is grounded.

(3.) A fugitive criminal who has been accused of some offence within English jurisdiction (by sec. 17 extended to any British Possession), not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, (by sec. 17 made synonymous with any British Possession), shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise :

(4) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

7. A requisition for the surrender of a fugitive criminal of any foreign state . . . shall be made to a Secretary of State (by sec. 17, a Governor substituted, in case of a colony) by some person recognized by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State (or Governor as the case may be) may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State (or Governor) is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order ; and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

10. . . . In the case of a fugitive criminal alleged to have been convicted of an extradition crime of which evidence is produced as

(subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the Police Magistrate shall commit him to prison, but otherwise shall order him to be discharged.

11. If the Police Magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

Upon the expiration of the said fifteen days, or, if a writ of *habeas corpus* is issued, after the decision of the Court upon the return to the writ. . . it shall be lawful . . . by warrant . . . to order the fugitive criminal . . . to be surrendered.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of *habeas corpus* is issued, after the decision of the Court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster (by sec. 17 extended to the Colonial Courts), upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State (or as provided by section 17, to a Colonial Governor), to order the criminal to be discharged out of custody unless sufficient cause is shown to the contrary. . . .

27. The Acts specified in the third schedule to this Act (Acts for giving effect to Extradition treaties with France, the United States and Denmark) are hereby repealed as to the whole of Her Majesty's Dominions; and this Act (with the exception of any thing contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the Foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and, as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of that Act.

FIRST SCHEDULE.—LIST OF CRIMES.

In Extradition Act of 1870 (33 and 34 Vict. Imp. c. 52.)

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the

alleged crime, whether by common law or by statute made before or after the passing of this Act :

Murder, and attempt and conspiracy to murder.—Manslaughter.—Counterfeiting and altering money, and uttering counterfeit or altered money.—Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.—Embezzlement and larceny.—Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.—Fraud, by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any Act for the time being in force.

Rape—Abduction—Child stealing—Burglary and house-breaking—Arson—Robbery with violence—Threats by letter or otherwise with intent to extort—Piracy by law of nations—Sinking or destroying a vessel at sea, or attempting or conspiring to do so—Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm—Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master.

The Imperial Extradition Act of 1870 was amended by the

EXTRADITION ACT, 1873, (36 AND 37 VICT. IMP. C. 60.)

entitled, An Act to amend the Extradition Act, 1870. The following are extracts from the 1st, 3rd and 8th sections of that Act.

1. This Act shall be construed as one with the Extradition Act, 1870 (in this Act referred to as the principal Act).

3. Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed, for the purposes of the principal Act and this Act, to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

8. The principal Act shall be construed as if there were included in the First Schedule to that Act the list of crimes contained in the Schedule to this Act.

SCHEDULE.—LIST OF CRIMES

in Extradition Act of 1873 (36 and 37 Vict. Imp. c. 60.)

The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act.

Kidnapping and false imprisonment—Perjury, and subornation of perjury, whether under common or statute law.

Any indictable offence, under the Larceny Act, 1861 (24 and 25 Vict. c. 96), or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence, under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-seven, "To consolidate and amend the Statute Law of England and Ireland relating to malicious injuries to property," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence, under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, "To consolidate and amend the statute law of England and Ireland, relating to indictable offences by forgery," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence, under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-nine. "To consolidate and amend the Statute law of the United Kingdom against offences relating to the coin," or any Act amending or substituted for the same, which is not included in the First schedule to the principal Act.

Any indictable offence, under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, "To consolidate and amend the Statute law of England and Ireland relating to offences against the person," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence, under the law for the time being in force in relation to Bankruptcy, which is not included in the first schedule to the principal Act.

In *re Charles Worms*, petitioner for a writ of *Habeas Corpus* (22 L. C. J., 109).

In Chambers, Court of Q. B., Sir A. A. Dorion, C. J., said :

The provisions of this Act (Extradition Act of 1870) are to apply to all or any part of Her Majesty's Dominions as may be declared by any order in Council, passed to that effect (sect. 2), and section 18 provides that Her Majesty by an order in Council applying the Act to any British possession, may direct that any law passed by the Legislature of

such British possession for the surrender of fugitive criminals shall have effect in such British possession, with or without modification, as if it were part of the Act of 1870. It was, therefore, competent for Her Majesty to direct by an order in Council that the Act of 1870 would apply to cases of fugitive criminals in Canada, under the arrangement made with the United States, and that the laws already passed in Canada, under the arrangement with the United States, should have the same effect as if they formed part of that Act.

What could have been done by an order in Council is effectually done, as regards Canada at least, by section 27 of that Act.

This section, first repeals the previous Imperial legislation therein mentioned, relating to the extradition of fugitive criminals; then, it provides that the Act of 1870, except when inconsistent with existing Treaties referred to in the repealed Statutes, shall apply in the whole of Her Majesty's Dominions as if an Order in Council to that effect had been passed, and also, as if such order in Council had directed that every law in force in any British possession, with respect to such Treaties, should have effect as part of that Act. As the Treaty with the United States as regards the extradition of fugitive criminals, existed when the Act of 1870 was passed, sec. 27 makes the Act applicable to that Treaty—except when inconsistent with it—throughout the whole of Her Majesty's Dominions, and as Canada had previous legislation on the subject, it makes that legislation part of the Act of 1870.

As to the second branch of the objection, it is unfounded, inasmuch as the Act of 1870 merely authorizes the Secretary of State in England, and the Governor of a British Possession, to issue an order requiring a Police Magistrate to issue his warrant for the apprehension of a fugitive criminal, but does not require it in every case; this is made evident by section 8 of the Act. This order is also expressly dispensed with by our Extradition Act of 1869, which, as already stated, must be taken as part of the Act of 1870 in the same manner as if an Order in Council had so directed it, under section 118, as regards the Extradition Treaty with the United States. . . .

It is also urged, that the Act of 1870 could not apply to Canada, because by the B. N. A. Act, sec. 132, the power to carry out any obligation resulting from Extradition Treaties had been absolutely given to Canada, and that if the Act were in force, then the formalities required were not observed, as no warrant from the Governor General had preceded the issuing of the warrant to arrest the accused. The answer to this objection is very simple. In the first place, the Act of 1870 is not

inconsistent with section 132 of the B. N. A. Act, 1867, and if it were, the last Act would prevail.

In the case of *Rosenbaum* (18 L. C. J., 200) whose extradition was applied for, in Montreal, in February, 1874, by the United States Government, for the crime of Arson, Ramsay, J., Held :

1. That sub-section 2 of section 3, of the Imperial Act of 1870, is inconsistent with the subsisting Extradition Treaty between Great Britain and the U. S., and is, therefore, not in force, *quoad* any application under such Treaty.

2. That a copy of a Bill of Indictment found against the prisoner in the United States cannot be received as evidence.

3. That the evidence adduced was sufficient to sustain the application.

After the passage of the Imperial Extradition Act of 1870, the British Government in the *Winslow* case declined, under the provisions of that Act, to surrender to the United States a fugitive to England charged with forgery, unless they were assured that he would not be tried for any offence other than that for which he should be surrendered.

The Government of the United States refused to consent to the application of section 3 of the Imperial Extradition Act of 1870, as being a disturbance of the Treaty of 1842; and, maintained that the Secretary of State alone should decide whether an offence with which a fugitive criminal is charged is of a political character. The U. S. Government also refused to annul the Treaty of 1842, for the purpose of entering into a more comprehensive one.

(Dom. Sess. Papers of 1877, No. 13.)

In 1877 the Parliament of Canada made provision by one general Statute (40 Vict. c. 25) for the execution of all the Extradition Treaties and Conventions made and to be made from time to time between Her Majesty and Foreign States, and for repealing previous Acts on the subject. After the passing of the Dominion Act of 1877, an address to Her Majesty was adopted by the Dominion Parliament, praying that she would cause steps to be taken to suspend the operation of the Imperial Extradition Acts of 1870 and 1873 so far as Canada was concerned. This request has not yet been acceded to.

Article 4 of the Dominion Extradition Act of 1877 (40 Vict. c. 25) reads as follows :—

In the case of any Foreign State with which there is, at or after the time this Act comes into force, an Extradition arrangement, this Act shall apply during the continuance of such arrangement: *Provided* that the operation of the Act of the Parliament of the United Kingdom passed in the year of our Lord one thousand eight hundred and seventy, and intituled "An Act for amending the law relating to the Extradition

tion of Criminals," shall have ceased or been suspended within Canada in the case of that state.

As already stated, the operation of the Imperial Acts of 1870 and 1873 not having been suspended as regards Canada, the Dominion Act of 1877 remains inoperative.

In *Re Bouvier* (42 L. J., N. S., 17, Queen's Bench, Nov. 21, 1872).

The accused was claimed in England, under the Extradition Treaty of 13th February, 1843, (replaced, since this decision, by the Treaty of 1876) between France and Great Britain, and arrested on a warrant issued under the Extradition Act, 1870. Section 3, sub-sec. 2 of that Act provided that a fugitive criminal shall not be surrendered to a Foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not be tried for any other crime. The Court of Q. B. upon the Affidavit of the officially appointed Counsel to the French Embassy in London, and the text books, found, that under the existing law of France such a provision is made, and therefore that the accused was not entitled to be discharged.

And held: That the Extradition Treaties are kept in full force by the Act of 1870, although the Acts passed to give them effect are thereby repealed.

Cockburn, C. J., in delivering judgment, said:

I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the Legislature; that is to say, it was intended, while getting rid of the Statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact, that, although it was expedient to repeal the Statutes, yet that the treaties should have full force and effect, instead of which, this complicated and obscure language has been adopted.

In *Alexander Terraz* (27 W. R., 179—L. R., 4 Ex. D. 63).

A native of Switzerland was apprehended under the Extradition Act of 1870 (33 and 34 Vict. c. 52) on a warrant charging him with "Crimes against Bankruptcy laws."

On a rule *nisi* for a *Habeas Corpus*, obtained on the ground that the offence charging the accused with "crimes against Bankruptcy laws" was not sufficiently alleged in the warrant, a fresh warrant was lodged charging the offence more specifically.

Held, that the first warrant contained a sufficient description of the offence.

Kelly, C. B., said : I do not think we can legitimately, lawfully or consistently refer to the second warrant on the argument of this rule.

In *re Wilson (Habeas Corpus)* (3 L. R., Q. B., Div. 42—13 Cox's Crim. Cases, 360) the Extradition Treaty of 1874 with Switzerland, provided that :

No Swiss shall be delivered up by the Swiss Government to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government of the United Kingdom.

In 1875, by an Order in Council the Imperial Extradition Act of 1870 was made applicable to this Treaty. Held :

That the Extradition Act of 1870 can only have application so far as it is consistent with the Treaty and that no British subject could be surrendered to the Swiss Government under that Treaty.

In *Commonwealth v. Hawes* (2 L. N. 79), Held :

That a fugitive to Canada (subsequent to 1870) indicted for forgery in the United States, and surrendered under the Extradition Treaty for that offence, could not be tried in the United States for another offence not extraditable, for which an indictment was also pending against him at the time of his surrender.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the Respective records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

Use of English
and French
Languages.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Ontario and Quebec.

134. Until the Legislature of Ontario or Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint, under the Great Seal of the Pro-

Appointment of
Executive Offi-
cers for Ontario
and Quebec.

vince, the following Officers, to hold the office during pleasure, that is to say,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and, in the Case of Quebec, the Solicitor General; and may, by order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof; and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

Powers Duties,
 &c., of Execu-
 tive Officers.

135. Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by an Law, Statute, or Ordinance of Upper Canada, Lower Canada and Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.

Great Seals.

136. Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

In a despatch of 27th March, 1877, from the Earl of Carnarvon to the Earl of Dufferin (Dom. Sess. Papers, 1877, No. 86, p. 47) we read :

3. No such clause as the foregoing appeared to have been considered necessary at the time of the Union in the case of Nova Scotia and New Brunswick, but in 1869 it was thought desirable that new Seals should be prepared for the Dominion of Canada, and for the four Provinces then included in the Dominion. New Seals were accordingly prepared, and on the 7th of May a Warrant was passed under the Queen's Sign Manual and Signet, addressed to the Governor General of the Dominion, authorizing and directing that the said Seals should, respectively, be used for the sealing of all things whatsoever, which should pass the Great Seals of the Dominion of Canada and Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, and requiring and commanding the return of the old Seals. This Warrant does not appear to have been obeyed in the case of Nova Scotia, where the use of the old Seal has been continued, notwithstanding Her Majesty's instructions ; and I learn that it has lately been contended in Nova Scotia, that, in consequence of such use of the old Seal, all documents which have passed the Great Seal since the receipt of the new Seal, are invalid.

The reason why no provision was made for other Provinces than Ontario and Quebec, was, that those other Provinces had already a Seal of their own, and that the B. N. A. Act having put an end to the Union then existing between Upper and Lower Canada, during which Union, they had the Common Seal of the Province of Canada, it was necessary to declare what should be the Seal of each (Ontario and Quebec) after Confederation.

The validity of the Great Seal of the Province of Nova Scotia which had been in use for more than a century was first called in question before the Courts of Nova Scotia in *Ritchie v. Lenoir et al.*, (*ante* p. 61), as preliminary to the main issues in that case.

Its validity was, however, held to have been settled (when that case came on Appeal, before the Supreme Court of Canada) by subsequent legislation in the Dominion and Provincial Legislatures, made at the suggestion of the Earl of Carnarvon, confirming and sanctioning all acts done under the old Seal, and also authorizing the Lieutenant Governor of Nova Scotia to alter the Seal of that Province.

The plaintiff objected, that the old Seal of the Province used in issuing the Letters Patent appointing *Lenoir et al.*, Queen's Counsel, and giving them precedence over him in the Courts of the Province, was not the valid Seal of the Province ; that the old Seal had been superseded by the warrant of Her Majesty directing the use of a new Seal, and commanding the return of the old Seal, and that such warrant was imperative and could not be disregarded, and consequently that the Letters Patent issued under the old Seal were invalid.

In the argument before the Supreme Court it was contended by Mr. Haliburton, Q.C., on behalf of defendants :

That as the old Seal purported to be the Great Seal, no question as to its validity could be raised before the Court ; that all documents under the Great Seal must be received without further proof, as being *matters of record* ; and that in this case the Seal was proved to have come from the keeper of the Great Seal, and to be the recognized Seal, as to which no question had ever been raised before.

That the new Seal could not come into use until adopted and proclaimed as such by the Governor in Council.

It was objected to the legislation of the Dominion Parliament since the decision of the Courts below, that, as this matter concerned "the administration of Justice in the Province," and was one of the "matters of a merely local or private nature in the Province," the action of the Dominion Parliament in sanctioning all acts done under the old Seal, and authorizing the Lieutenant Governor of Nova Scotia to alter the Seal of that Province, was an interference with the exclusive powers conferred upon the Provincial Legislatures by Sect. 92 of the Confederation Act, and *ultra vires* ; and, moreover,—

That as the question of altering the Great Seal was one affecting the prerogative, the Dominion Parliament was not authorized to vest this power in the Provincial Legislature ; that it was competent for Her Majesty alone, by Letters Patent or order in Council, to validate the past use of the old Seal.

Mr. Haliburton, Q.C., remarked :—

That all this difficulty as to the Great Seal arose from a singular blunder of the Herald's College ; that they had probably been ignorant that Nova Scotia had had arms assigned to it by Charles I. when it was a Scottish Colony. That, from inquiries made at the office at Edinburgh of the Lyon-King-at-Arms, it was found, that in the reign of Charles I. arms were granted to Nova Scotia of a highly honorable character, being the arms of Scotland counter-charged with the Royal arms of Scotland for an inescutcheon ; and as a further mark of honor, one of the Royal supporters, the Unicorn, was granted to Nova Scotia, the other supporter being "a naked savage with a club."

These arms are still used by the Baronets of Nova Scotia, and were registered early in the present century in the Lyon office. It is evident that the Herald's College never thought of the fact that Nova Scotia was originally a Scottish Colony, and they therefore made no search for its arms in the Lyon Office. That the arms granted were

what is called in Heraldry an "abatement," being of inferior dignity, and without supporters.

The Seal intended for Nova Scotia was sent to the Provincial Secretary of Nova Scotia with instructions to the Lieutenant Governor to take the necessary steps to cause the same to be adopted, which were not complied with.

The following authorities were cited on behalf of the Appellant.

"Absolute faith is universally given to every document purporting to be under the Great Seal, as having been duly sealed with the authority of the Sovereign." (Lord Campbell's *Lives of the Lord Chancellors*, *Intr.*) "Royal grants are matters of public record" (Stevens' Comm., B. II, pt. 1, c. 21), and as such, "import truth upon their face," per all the Justices in *Judford vs. Green*, cited in 17 Viner, 456; also, *ib* 71-8; 2 Inst. 555, 6, c. b. Bro. Abr. *Tit. patents* 2 Comm., c. 21.—Lord Melville's case, 27 St. Tr. 707.—Baron Maseres, *Canadian Freeholder*, 11, 238, 243. Sir Harris Nicholas' *Intr.* to vol. 5 of Acts of Privy Council.—12 and 13 Vict. (Imp.) c. 109, s. 10, enacts respecting "the Chancery Common Law Seal" that "all Courts, &c., shall take notice of the said Seal, and receive impressions thereof in evidence, and shall also take notice and receive in evidence *without further proof* all and every such writs, &c., whatever, which *shall purport or appear to be sealed or stamped with the said Chancery Common Law Seal*, for the time being, *in like manner as if the same had been sealed with the Great Seal.*" The Lord Chancellor's Case, Hobart 214, Pl. 273—Clarke's *Colonial Law*, p. 31-32, 34.

As to mode of changing the Great Seal, see Hale, P. C. 171-177. Campbell's *Lives of the Lord Chancellors*, Notes to Vol. II., ch. 44.

In the course of the argument, Mr. Justice Strong remarked: "Where the Crown can legislate alone, it is done by order in Council, which is promulgated. There was no such proclamation in this case, and we say that the old Seal was never legally superseded."

Mr. Justice Strong referred to the Dominion Act 40 Vict. c. 3 and the Nova Scotia Act 40 Vict. c. 2, which had been passed pending the litigation in this case, and it was admitted by Counsel on both sides that this legislation of these two bodies had settled the question of the validity of the old Seal; the passing of the Local Act of Nova Scotia removing the objection of the want of power on the part of the Dominion Parliament to give validity to the old Seal.

By 40 Vict. Can. c. 3, an Act respecting the great seals of the Provinces of Canada, other than Ontario and Quebec (assented to 28th April, 1877) it was enacted as follows:

1. The Lieutenant Governor of each Province in Council has the

X.—INTERCOLONIAL RAILWAY.

Duty of Gov-
ernment and
Parliament of
Canada to make
Railway herein
described.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of CANADA: Therefore, in order to give effect to that Agreement, it shall be the duty of the Government and Parliament of CANADA to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without intermission, and the Completion thereof with all practicable Speed.

In reference to this sub-section the Earl of Carnarvon, on the 2nd Reading of the B. N. A. Bill before the House of Lords, remarked that:

Such an undertaking was part of the compact between the several Provinces, and it was an indispensable condition on the part of New Brunswick. Successive Governments at home have entertained the scheme, and have pledged themselves to the promise of more or less assistance.

XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of CANADA, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have

effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

On the Second Reading of the B. N. A. Bill in the House of Lords on 19th February, 1867, the Earl of Carnarvon remarked :

There is, indeed, a question of great importance and intimately connected with the future fortunes of the Confederated Provinces, and I may perhaps be asked why it finds no place in this measure. My Lords, I am fully alive to the urgent importance of coming to some settlement of the Hudson Bay Company's claims. The progress of American colonization on the West, the Confederation of the Provinces on the East, render an early decision necessary. But till this Union is completed it would be a waste of time to discuss the relations of the Hudson Bay Company's territories to the Provinces. When once this Bill becomes law, it will be the duty of Her Majesty's Government not to lose one day unnecessarily in dealing with this great subject.

Hudson Bay Company.

On the 31st July, 1868, an Act was passed by the Imperial Parliament (31 & 32 Vict. c. 105) entitled, "An Act for enabling Her Majesty to accept a surrender upon terms" of the lands, privileges and rights of "The Governor and Company of Adventurers of England trading into Hudson Bay," and for admitting the same into the Dominion of Canada.

And in pursuance of this Act—under the pressure exercised over the Hudson Bay Company by the Colonial Secretary during the Civil War in the United States—Canada acquired all the privileges and rights of the Company in a tract of country 1,200 miles long and 500 miles broad for the sum of £300,000 sterling.

And an Imperial Act was passed (32 and 33 Vict. c. 101) to provide for the Guarantee of the loan for the payment of the Hudson Bay Company for Rupert's land.

Manitoba.

On the 22nd June, 1869, an Act was passed by the Parliament of Canada (32 and 33 Vict. c. 3) to provide for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada ; and on the 12th May, 1870, an Amending Act was passed to provide (under the authority of the 146th section of the B. N. A. Act, 1867) for the formation, establishment and government of the Province of Manitoba, and for its admission into the Union, on and from, the day appointed by Her Majesty for the admission into the Union of the North-Western Territory and Rupert's Land. This Act also provided for the Civil Government of the remaining part of said Territories (not included within the limits of the said Province) on and from the day appointed by Her Majesty for their admission into the Union.

North-Western Territory and Rupert's Land.

By Imperial Order in Council of the 23d June, 1870 (see 35 Vict. Can., p. lxiii), it was ordered and declared by Her Majesty, by and with the advice of the Privy Council in pursuance and exercise of the powers vested in Her Majesty by Parliament, that from and after the 15th July, 1870, the North-Western Territory and Rupert's Land shall be admitted into and become part of the Dominion of Canada.

British Columbia.

On addresses from the Houses of the Parliament of Canada and of the Colony of British Columbia, under 146 section of B. N. A. Act, 1867, this Colony was admitted into the Confederation by Imperial Order in Council of 16th May, 1871 (see 35 Vict., Can., p. lxxx), declaring that from and after the 20th July, 1871, the Colony of British Columbia shall be admitted into and become part of the Dominion of Canada.

Prince Edward Island.

By Act of the Parliament of Canada of 23d May, 1873 (36 Vict. c. 40), the terms and conditions of the admission into the Union of the Colony of Prince Edward Island were declared, in anticipation of its admission; and by an Imperial Order in Council of the 26th June, 1873 (see 36 Vict., Can., p. ix), this Colony was admitted as a Province of the Dominion of Canada from and after the 1st July, 1873, upon the terms and conditions set forth in the addresses of the House of Commons and Senate of Canada, and of the Legislative Council and House of Assembly of Prince Edward Island.

As to Representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of CANADA of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the Normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the Third of the Three Divisions into which CANADA is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

By the Statute 34 and 35 Vict. Imp. c. 28 (35 Vict. Can., p. li.), the power to establish Provinces in Territories admitted, or which may hereafter be admitted, into the Dominion of Canada was more certainly vested in the Parliament of Canada by Imperial legislation. The following is a copy of the Statute :

The British North America Act, 1871.

AN ACT

(34 and 35 *Victoria*, Chap. 28)

RESPECTING THE ESTABLISHMENT OF PROVINCES IN THE DOMINION
OF CANADA.

[29th June, 1871.]

WHEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament :

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and, by the authority of the same, as follows :—

1. This Act may be cited for all purposes as “ The British North America Act, 1871.”

2. The Parliament of Canada may from time to time establish new Provinces in any Territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province and for the passing of laws for the peace, order and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the

said Dominion, increase, diminish, or otherwise alter the limits of such Province upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of Territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good Government of any Territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada and intituled respectively :

“An Act for the Temporary Government of Rupert’s Land and the North Western Territory when united with Canada,” and

“An Act to Amend and continue the Act Thirty-two and Thirty-three Victoria, chapter three, and to establish and provide for the Government of the Province of Manitoba,”

Shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen’s name, of the Governor General of the said Dominion of Canada.

[Confirmation of Acts of Parliament of Canada, 32 and 33 Vict. cap. 3. Assented to 22nd June, 1869 & 33 Vict. cap. 3. Assented to 12th May, 1870.]

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

QUEBEC RESOLUTIONS.

RESOLUTIONS ADOPTED AT QUEBEC, in October 1864, at a Conference of Delegates, from Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

1. The best interests and present and future prosperity of British North America will be promoted by a Federal Union under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.

2. In the Federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests of the several Provinces, and secure efficiency, harmony and permanency in the working of the Union, would be a General Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, charged with the control of local matters in their respective sections,—provision being made for the admission into the Union, on equitable terms, of Newfoundland, the North-West Territory, British Columbia and Vancouver.

3. In framing a Constitution for the General Government, the Conference, with a view to the perpetuation of our connection with the Mother Country, and the promotion of the best interests of the people of these Provinces, desire to follow the model of the British Constitution, so far as our circumstances will permit.

4. The Executive Authority or Government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British Constitution, by the Sovereign personally, or by the Representative of the Sovereign duly authorized.

5. The Sovereign or Representative of the Sovereign shall be Commander-in-Chief of the Land and Naval Militia Forces.

6. There shall be a General Legislature or Parliament for the Federated Provinces, composed of a Legislative Council and a House of Commons.

7. For the purpose of forming the Legisla-

tive Council, the Federated Provinces shall be considered as consisting of three divisions: 1st, Upper Canada; 2nd, Lower Canada; 3rd, Nova Scotia, New Brunswick and Prince Edward Island; each division with an equal representation in the Legislative Council.

8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the three Maritime Provinces by 24 members, of which Nova Scotia shall have 10, New Brunswick 10, and Prince Edward Island 4 members.

9. The Colony of Newfoundland shall be entitled to enter the proposed Union with a representation in the Legislative Council of four members.

10. The North-West Territory, British Columbia and Vancouver shall be admitted into the Union on such terms and conditions as the Parliament of the Federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty; and in the case of the Province of British Columbia or Vancouver as shall be agreed to by the Legislature of such Province.

11. The Members of the Legislative Council shall be appointed by the Crown under the Great Seal of the General Government, and shall hold office during life; if any Legislative Councillor shall for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant.

12. The Members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of thirty years, shall possess a continuous real property qualification of four thousand dollars over and above all incumbrances, and shall be and continue worth that sum over and above their debts and liabilities; but in the case of Newfoundland and Prince Edward Island, the property may be either real or personal.

13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the Council.

14. The first selection of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces so far as a sufficient number be found qualified and willing to serve; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the opposition in each Province, so that all political parties may, as nearly as possible, be fairly represented.

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the Members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.

16. Each of the twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the General Legislature shall be appointed to represent one of the twenty-four Electoral Divisions mentioned in Schedule A of Chapter first of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the Division he is appointed to represent.

17. The basis of Representation in the House of Commons shall be Population, as determined by the Official Census every ten years; and the number of Members at first shall be 194, distributed as follows:

Upper Canada.....	82
Lower Canada.....	65
Nova Scotia.....	19
New Brunswick.....	15
Newfoundland.....	8
Prince Edward Island.....	5

18. Until the Official Census of 1871 has been made up, there shall be no change in the number of Representatives from the several sections.

19. Immediately after the completion of the Census of 1871, and immediately after every decennial census thereafter, the Representation from each section in the House of Commons shall be readjusted on the basis of Population.

20. For the purpose of such readjustments, Lower Canada shall always be assigned

sixty-five Members, and each of the other sections shall, at each readjustment, receive for the ten years then next succeeding, the number of Members to which it will be entitled on the same ratio of Representation to Population as Lower Canada will enjoy according to the Census last taken, by having sixty-five Members.

21. No reduction shall be made in the number of Members returned by any section, unless its population shall have decreased, relatively to the population of the whole Union, to the extent of five per centum.

22. In computing at each decennial period the number of Members to which each section is entitled, no fractional parts shall be considered, unless when exceeding one-half the number entitling to a Member, in which case a Member shall be given for each such fractional part.

23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them.

24. The Local Legislature of each Province may, from time to time, alter the Electoral Districts for the purposes of Representation in such Local Legislature, and distribute the Representatives to which the Province is entitled in such Local Legislature, in any manner such Legislature may see fit.

25. The number of Members may at any time be increased by the General Parliament, —regard being had to the proportionate rights then existing.

26. Until provisions are made by the General Parliament, all the laws which, at the date of the Proclamation constituting the Union, are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a Member of the Assembly in the said Provinces respectively, and relating to the qualification or disqualification of voters, and to the oaths to be taken by voters, and to Returning Officers and their powers and duties,—and relating to the proceedings at Elections, and to the period during which such elections may be continued,—and relating to the Trial of Controverted Elections, and the proceedings incident thereto,—and relating to the vacating of seats of Members, and to the issuing and execution of new Writs, in case of any seat being vacated otherwise than by a disso-

lution—shall respectively apply to elections of Members to serve in the House of Commons, for places situate in those Provinces respectively.

27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.

28. There shall be a Session of the General Parliament once, at least, in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the General Parliament in one Session, and the first sitting thereof in the next Session.

29. The General Parliament shall have power to make Laws for the peace, welfare and good government of the Federated Provinces (saving the Sovereignty of England), and especially laws respecting the following subjects:—

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The imposition or regulation of Duties of Customs on Imports and Exports,—except on Exports of Timber, Logs, Masts, Spars, Deals and Sawn Lumber from New Brunswick, and of Coal and other Minerals from Nova Scotia.
4. The imposition or regulation of Excise Duties.
5. The raising of money by all or any other modes or systems of Taxation.
6. The borrowing of money on the Public Credit.
7. Postal Service.
8. Lines of Steam or other Ships, Railways, Canals and other works, connecting any two or more of the Provinces together, or extending beyond the limits of any Province.
9. Lines of Steamships between the Federated Provinces and other Countries.
10. Telegraph Communication and the Incorporation of Telegraph Companies.
11. All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.
12. The Census.
13. Militia—Military and Naval Service and Defence.
14. Beacons, Buoys and Light Houses.
15. Navigation and Shipping.
16. Quarantine.
17. Sea Coast and Inland Fisheries.

18. Ferries between any Provinces and a Foreign country, or between any two Provinces.

19. Currency and Coinage.

20. Banking—Incorporation of Banks, and the issue of Paper Money.

21. Savings Banks.

22. Weights and Measures.

23. Bills of Exchange and Promissory Notes.

24. Interest

25. Legal Tender.

26. Bankruptcy and Insolvency.

27. Patents of Invention and Discovery.

28. Copy Rights.

29. Indians and Lands reserved for the Indians.

30. Naturalization and Aliens.

31. Marriage and Divorce.

32. The Criminal Law, excepting the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal matters.

33. Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island, and rendering uniform the procedure of all or any of the Courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.

34. The establishment of a General Court of Appeal for the Federated Provinces.

35. Immigration.

36. Agriculture.

37. And generally respecting all matters of a general character, not specially and exclusively reserved for the Local Governments and Legislatures.

30. The General Government and Parliament shall have all powers necessary or proper for performing the obligations of the Federated Provinces, as part of the British Empire, to foreign countries, arising under Treaties between Great Britain and such countries.

31. The General Parliament may also, from time to time, establish additional Courts, and the General Government may appoint Judges and officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament.

32. All Courts, Judges, and officers of the several Provinces shall aid, assist and obey the General Government in the exercise of its rights and powers, and for such purposes

shall be held to be Courts, Judges and officers of the General Government.

33. The General Government shall appoint and pay the Judges of the Superior Courts in each Province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries.

34. Until the consolidation of the Laws of Upper Canada, New Brunswick, Nova Scotia Newfoundland and Prince Edward Island, the Judges of these Provinces, appointed by the General Government, shall be selected from their respective Bars.

35. The Judges of the Courts of Lower Canada shall be selected from the Bar of Lower Canada.

36. The Judges of the Court of Admiralty now receiving salaries, shall be paid by the General Government.

37. The Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the Address of both Houses of Parliament.

38. For each of the Provinces there shall be an Executive Officer, styled the Lieutenant-Governor, who shall be appointed by the Governor General in Council, under the Great Seal of the Federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause: such cause to be communicated in writing to the Lieutenant-Governor immediately after the exercise of the pleasure as aforesaid, and also by Message to both Houses of Parliament, within the first week of the first session afterwards.

39. The Lieutenant-Governor of each Province shall be paid by the General Government.

40. In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Government for the amount now paid for the salary of the Lieutenant-Governor thereof.

41. The Local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of each such Province shall provide.

42. The Local Legislature shall have power to alter or amend their Constitution from time to time.

43. The Local Legislatures shall have

power to make laws respecting the following subjects:

1. Direct taxation, and in New Brunswick the imposition of duties on the export of Timber, Logs, Masts, Spars, Deals and Sawed Lumber; and in Nova Scotia, of Coals and other Minerals.
2. Borrowing money on the credit of the Province.
3. The establishment and tenure of local offices, and the appointment and payment of local officers.
4. Agriculture.
5. Immigration.
6. Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation.
7. The sale and management of Public Lands, excepting lands belonging to the General Government.
8. Sea Coast and Inland Fisheries.
9. The establishment, maintenance and management of Penitentiaries, and Public and Reformatory Prisons.
10. The establishment, maintenance and management of Hospitals, Asylums, Charities and Eleemosynary Institutions.
11. Municipal Institutions.
12. Shop, Saloon, Tavern, Auctioneer and other Licenses.
13. Local Works.
14. The incorporation of Private or Local Companies, except such as relate to matters assigned to the General Parliament.
15. Property and Civil Rights, excepting those portions thereof assigned to the General Parliament.
16. Inflicting punishment by fine, penalties, imprisonment or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.
17. The Administration of Justice, including the constitution, maintenance and organization of the Courts, both of Civil and Criminal jurisdiction, and including also the procedure in civil matters.
18. And generally all matters of a private or local nature, not assigned to the General Parliament.
44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part, which belongs of right to the Crown, shall be administered by the Lieutenant-Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the General

Government, and subject to any provisions that may be made in this behalf by the General Parliament.

45. In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede those made by the Local Legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with, the former.

46. Both the English and French languages may be employed in the General Parliament and in its proceedings, and in the Local Legislature of Lower Canada, and also in the Federal Courts and in the Courts of Lower Canada.

47. No lands or property belonging to the General or Local Governments shall be liable to taxation.

48. All Bills for appropriating any part of the Public Revenue, or for imposing any new Tax or Impost, shall originate in the House of Commons or House of Assembly, as the case may be.

49. The House of Commons or House of Assembly shall not originate or pass any Vote, Resolution, Address or Bill for the appropriation of any part of the Public Revenue, or of any Tax or Impost to any purpose, not first recommended by Message of the Governor General or the Lieutenant-Governor, as the case may be, during the Session in which such Vote, Resolution, Address or Bill is passed.

50. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any Bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor General.

51. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto; and, in like manner, any Bill passed by a Local Legislature shall be subject to disallowance by the Governor General within one year after the passing thereof.

52. The Seat of Government of the Federated Provinces shall be Ottawa, subject to the Royal Prerogative.

53. Subject to any future action of the respective Local Governments, the Seat of the Local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and

the Seats of the Local Governments in the other Provinces shall be as at present.

54. All Stocks, Cash, Bankers' Balances and Securities for money belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the General Government.

55. The following Public Works and Property of each Province shall belong to the General Government, to wit:—

1. Canals.
2. Public Harbours.
3. Light Houses and Piers.
4. Steamboats, Dredges and Public Vessels.
5. River and Lake Improvements.
6. Railway and Railway Stocks, Mortgages and other debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices and other Public Buildings, except such as may be set aside by the General Government for the use of the Local Legislatures and Governments.
9. Property transferred by the Imperial Government and known as Ordnance Property.
10. Armories, Drill Sheds, Military Clothing and Munitions of War; and
11. Lands set apart for public purposes.

56. All Lands, Mines, Minerals and Royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same.

57. All sums due from purchasers or lessees of such lands, mines or minerals at the time of the Union, shall also belong to the Local Governments.

58. All Assets connected with such portions of the Public Debt of any Province as are assumed by the Local Governments, shall also belong to those Governments respectively.

59. The several Provinces shall retain all other Public Property therein, subject to the right of the General Government to assume any Lands or Public Property required for Fortifications or the Defence of the Country.

60. The General Government shall assume all the Debts and Liabilities of each Province.

61. The Debt of Canada, not specially assumed by Upper and Lower Canada respectively, shall not exceed, at the time of the Union, \$62,500,000; Nova Scotia shall enter the Union with a debt not exceeding \$8,000,000; and New Brunswick with a debt not exceeding \$7,000,000.

62. In case Nova Scotia or New Brunswick do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts, at the date of Union, less than \$8,000,000 and \$7,000,000 respectively, they shall be entitled to interest at five per cent. on the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island; the foregoing resolution being in no respect intended to limit the powers given to the respective Governments of those Provinces by Legislative authority, but only to limit the maximum amount of charge to be assumed by the General Government; provided always that the powers so conferred by the respective Legislatures shall be exercised within five years from this date, or the same shall then elapse.

63. Newfoundland and Prince Edward Island, not having incurred debts equal to those of the other Provinces, shall be entitled to receive, by half-yearly payments, in advance, from the General Government, the interest at five per cent. on the difference between the actual amount of their respective debts at the time of the union, and the average amount of indebtedness per head of the population of Canada, Nova Scotia and New Brunswick.

64. In consideration of the transfer to the General Parliament of the powers of taxation, an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population, as established by the Census of 1861; the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the General Government for local purposes, and shall be paid half-yearly in advance to each Province.

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years from the time when

the Union takes effect, an additional allowance of \$63,000 per annum shall be made to that Province. But that so long as the liability of that Province remains under \$7,000,000, a deduction equal to the interest on such deficiency shall be made from the \$63,000.

66. In consideration of the surrender to the General Government, by Newfoundland, of all its rights in Mines and Minerals, and of all the ungranted and unoccupied Lands of the Crown, it is agreed that the sum of \$150,000 shall each year be paid to that Province by semi-annual payments; provided that that Colony shall retain the right of opening, constructing and controlling roads and bridges through any of the said lands, subject to any laws which the General Parliament may pass in respect of the same.

67. All engagements that may, before the Union, be entered into with the Imperial Government for the defence of the country, shall be assumed by the General Government.

68. The General Government shall secure, without delay, the completion of the Inter-colonial Railway from Rivière du Loup, through New Brunswick, to Truro in Nova Scotia.

69. The communications with the North-Western Territory, and the improvements required for the development of the trade of the Great West with the seaboard, are regarded by this Conference as subjects of the highest importance to the Federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.

70. The sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference.

71. That Her Majesty the Queen be solicited to determine the rank and name of the Federated Provinces.

72. The Proceedings of the Conference shall be authenticated by the signatures of the Delegates, and submitted by each Delegation to its own Government, and the Chairman is authorized to submit a copy to the Governor General for transmission to the Secretary of State for the Colonies.

CONSTITUTION OF THE UNITED STATES.

Preamble.

We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

The Legislative Power.

SECTION 1.

1. All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New-Hampshire shall be entitled to choose three; Massachusetts eight; Rhode Island and Providence Plantations one; Connecticut five; New York six; New Jersey four; Pennsylvania eight; Delaware one; Maryland six; Virginia ten; North Carolina five; South Carolina five; and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3.

1. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice-president of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4.

1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

1. Each house shall be judge of the elections, returns and qualifications of its own members; and a majority of each shall constitute a *quorum* to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to or returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION 7.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall

likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The Congress shall have power,—

1. To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the supreme court: To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

12. To provide and maintain a navy:

13. To make rules for the government and regulation of the land and naval forces:

14. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

15. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

16. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority, over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other useful buildings: and,

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION 9.

1. The migration or importation of such persons as any of the states now existing shall

think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law, shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law: and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign state.

SECTION 10.

1. No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

The Executive Power.

SECTION 1.

1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representatives, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said House shall, in like manner, choose the president. But in choosing the president, the votes

shall be taken by states, the representation from each state having one vote : a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the vice-president.]

(The preceding sub-section 3 was amended in 184 by Article 12 of the Amendments.)

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time or the adoption of this constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the Congress may, by law, provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2.

1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States ; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices ; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur : and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of the departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3.

1. He shall from time to time give the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient ; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper ; he shall receive ambassadors and other public ministers ; he shall take care that the laws be faithfully executed ; and shall commission all the officers of the United States.

SECTION 4.

1. The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.

ARTICLE III.

Judicial Power.

SECTION 1.

1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labour in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour; but shall be delivered up on claim of the party to whom such service or labour may be due.

SECTION 3.

1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4.

1. The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

1. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article: and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the Constitution or laws of any state to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all Executive and Judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution: but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The Ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America, the twelfth.

In witness whereof, we have hereunto subscribed our names.

(Signed by)

GEORGE WASHINGTON,

President and Deputy from Virginia, and by 39 Delegates.

AMENDMENTS

PROPOSED by Congress, and ratified by three-fourths of the States pursuant to the Fifth Article of the Constitution.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of speech, or of the press ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner ; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favour ; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(The 10 preceding Amendments were ratified in 1791.)

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

(The 11th Amendment was ratified in 1796.)

ARTICLE XII.

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted:—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

(The 12th Amendment was ratified in 1804.)

ARTICLE XIII.

SECTION 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.

Congress shall have power to enforce this article by appropriate legislation.

(The 13th Amendment was ratified in 1865.)

ARTICLE XIV.

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians, not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State Legislature, or as an Executive or Judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4.

The validity of the public debt of the United States, authorised by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims, shall be held illegal and void.

SECTION 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

(The 14th Amendment was ratified in 1868.)

ARTICLE XV.

SECTION 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude.

SECTION 2.

The Congress shall have power to enforce this Article by appropriate legislation.

(The 15th Amendment was ratified in 1870.)

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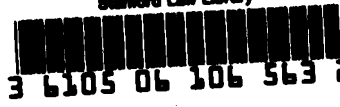
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